No. 25 Orig'l

IN THE

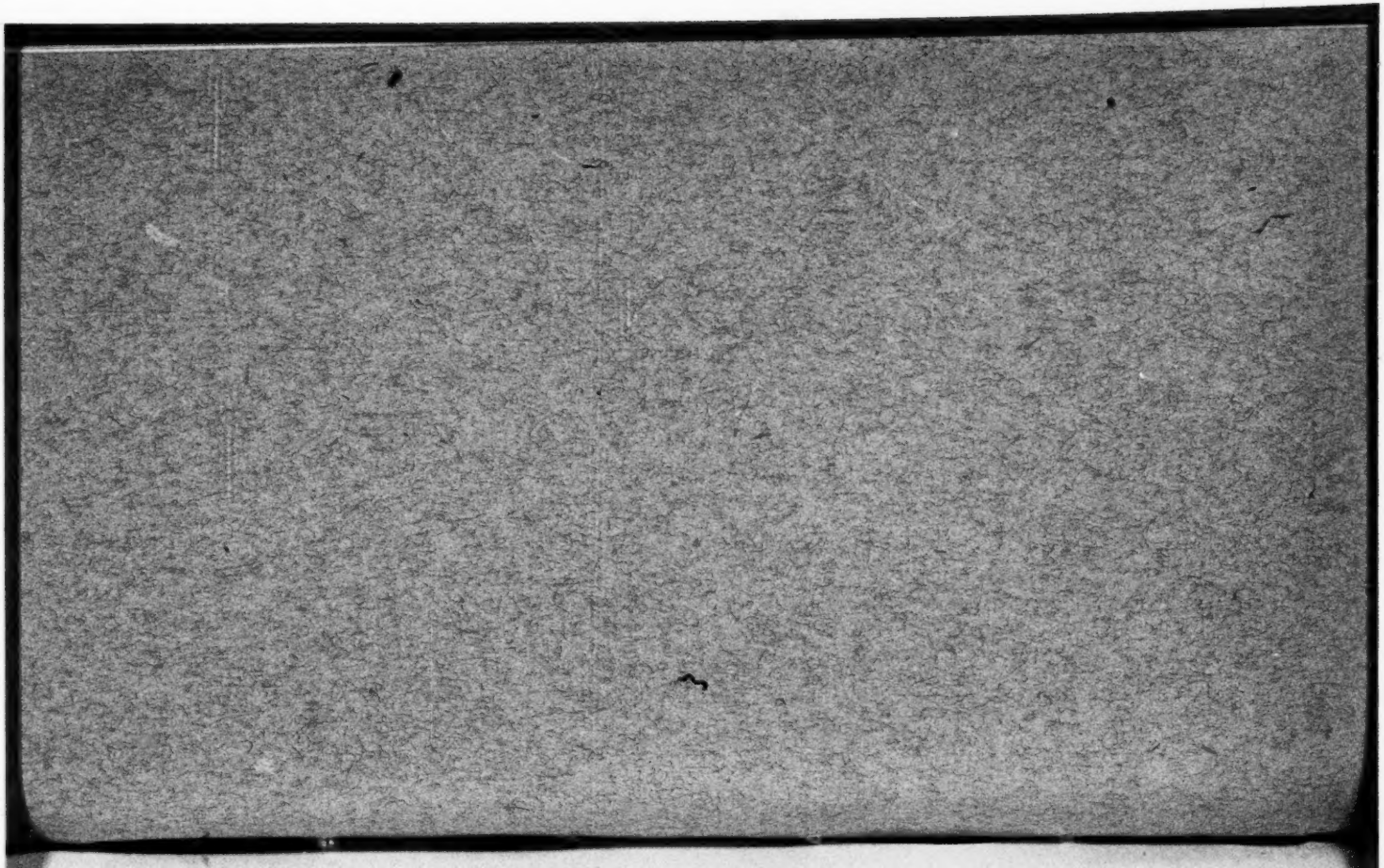
SUPREME COURT OF THE UNITED STATES

In the Matter of the Petition of THE INDIANA TRANSPORTATION COMPANY for Writ of Prohibition.

PETITION.

CHARLES E. KREMER,
Proctor.

Geo. Hornstein Co., Printer, Chicago.



IN THE

Supreme Court of the United States

In the Matter of the Petition of THE INDIANA TRANSPORTATION COMPANY for Writ of Prohibition.

PETITION FOR WRIT OF PROHIBITION.

To the Honorable the Judges of the Supreme Court of the United States:

The petition of the Indiana Transportation Company against the Honorable Kenesaw M. Landis, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, sitting in Admiralty, respectfully represents:

FIRST. That this petitioner is and was at the different times hereinafter mentioned, a corporation organized and existing under the laws of the State of Indiana, with its principal place of business at Michigan City, Indiana.

SECOND. That on the 21st day of August, 1915, James F. Bishop, as administrator of the estate of Earl H. Dawson, deceased, filed his libel in the District Court of the United States for the Northern

District of Illinois, Eastern Division, in admiralty against this petitioner, the St. Joseph-Chicago Steamship Company and the Dunham Towing & Wrecking Company, in which it was alleged that on the 24th day of July, 1915, the St. Joseph-Chicago Steamship Company, a corporation, was the owner of the steamer known as the Eastland, and your petitioner, the Indiana Transportation Company, was the charterer of the said steamer, and that they accepted Earl H. Dawson as a passenger on the Steamer Eastland and so carelessly, negligently, etc., managed the said steamer that she tipped over in the Chicago river, by reason whereof the said Dawson was killed, as will more fully appear from a copy of the libel hereto attached and made a part of this petition.

THIRD. That after the filing of the said libel a citation was issued which was served upon your petitioner, and thereupon on the 2nd day of October, 1915, your petitioner filed its exceptions to the said libel, alleging briefly that the said libel did not set forth a cause of action against your petitioner, as will more fully appear from the said exception made a part of this petition.

FOURTH. That on the 24th day of July, 1916, by leave of court given by the Honorable Kenesaw M. Landis, sitting as Judge of the District Court in which the said case is pending, the libelant, James F. Bishop, was permitted to join as co-libelants with him 373 other libelants represented in part by the said James F. Bishop as administrator, etc., and other administrators of the estates of deceased people who lost their lives as passengers of the Steamer

Eastland at the same time and in the same way that libelant lost his life, by reason of the capsizing of the Steamer Eastland, and that the co-libelants as administrators, represented different deceased men, women and children, and in addition thereto there were included a number of persons as co-libelants who sustained personal injuries and loss of property by reason of the capsizing of the said Steamer Eastland, all of which said administrators and persons suing for personal injuries, loss of property, etc., have separate and distinct causes of action for the loss and damage sustained by them, as alleged in said amended libel. That no process was prayed for or issued under said amended libel.

FIFTH. That the said amended libel also alleges that the Indiana Transportation Company was a corporation organized under the laws of the State of Indiana.

SIXTH. That at the time of the amending of the said libel the said Indiana Transportation Company was a foreign corporation and non-resident of the State of Illinois, and not doing business in the said State, and therefore not subject to service upon it by process of the District Court of the United States for the Northern District of Illinois.

SEVENTH. Upon the filing of the said amended libel petitioner was ordered to plead to the same by the 2nd day of September, 1916, and that thereupon on the 2nd day of September, 1916, your petitioner filed its exceptions to said amended libel alleging that the 373 co-libelants were improperly joined with the original libelant, as will appear from a copy of

the said exceptions attached hereto and made a part of this petition.

EIGHTH. That on the 18th day of September, 1916, the said cause came on for a hearing before the Honorable Kenesaw M. Landis, Judge of the District Court, upon the amended libel and the exceptions of this petitioner to the same, and thereupon the court, upon a hearing, overruled the exceptions filed by your petitioner, and entered an order that your petitioner have twenty days in which to plead to said amended libel.

NINTH. That your petitioner is therefore compelled to answer the said amended libel or suffer a default and decree to be entered against it or to attend a trial and a hearing on each of the said claims of the 377 co-libelants, and it will thereby be put to great expense, annoyance and trouble.

Wherefore, petitioner prays that a writ of prohibition may issue against the said Kenesaw M. Landis, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, or any other Judge of the said court, from proceeding with the hearing of any of the 373 claims, or any and all other claims except the claim of the original libelant filed to recover for the death of said Earl H. Dawson, deceased.

CHARLES E. KREMER,
Proctor for Petitioner.

INDIANA TRANSPORTATION CO.,

By .....
President.

STATE OF INDIANA, }
COUNTY OF LAPORTE. } ss.

On this 11 day of ~~September~~ October, 1916, before me personally appeared S. W. Larson, the president and an officer of the Indiana Transportation Company, the above named petitioner, and was sworn to the truth of the foregoing petition.

Wm. J. Hickell
Notary Public.

Seal

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

In Admiralty.

To the Honorable Judges of the District Court of the United States, in and for Said Division:

The libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, against the St. Joseph-Chicago Steamship Company, a corporation, the Indiana Transportation Company, a corporation, and the Dunham Towing and Wrecking Company, a corporation, in a cause of damage, civil and maritime, alleges as follows:

FIRST. That the libelant is administrator of the estate of Earl H. Dawson, deceased, duly appointed and qualified to act as such.

SECOND. That on July 24, A. D. 1915, the St. Joseph-Chicago Steamship Company, a corporation, was the owner of the steamer known as the "Eastland," and had chartered said steamer to said Indiana Transportation Company, for the purpose of carrying passengers thereon to Michigan City, Indiana, from a point on the Chicago River, near, and just west of, the Clark street bridge which crosses said river, in the City of Chicago, County of Cook and State of Illinois, district and division aforesaid, and said Dunham Towing and Wrecking Company, a corporation, was the owner of a tug boat known as the "Kenosha," which was attached to said steamer "Eastland" by ropes and cables, at the point aforesaid on said Chicago River, and said

steamer and tug were then and there being used by said libelees in the business of commerce and navigation upon Lake Michigan and its tributary waters, including said Chicago River.

THIRD. Libelant, upon information and belief, alleges that on said 24th day of July, A. D. 1915, said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company accepted as a passenger on said steamer said Earl H. Dawson, at the point aforesaid on said Chicago River, for the purpose of conveying said Earl H. Dawson as such passenger to Michigan City, Indiana, on said steamer, and while attempting so to do, then and there so carelessly, negligently, wilfully, wantonly, wrongfully and improperly so managed, operated and controlled said steamer that it then and there tipped over on its side in said Chicago River, and by reason thereof said Earl H. Dawson was then and there killed.

FOURTH. Libelant also alleges, on information and belief, that at the time and place of the tipping over of said steamer as aforesaid, said Dunham Towing and Wrecking Company so carelessly, negligently, wilfully, wantonly, wrongfully and improperly managed, operated and controlled its said tug boat while so attached to said steamer as aforesaid, that thereby, in connection with said wrongful, negligent and improper conduct of said other libelees, said steamer was then and there caused to tip over as aforesaid.

FIFTH. Libelant, not being advised of all that took place and of all conditions existing on and in connection with said steamer and tug at and before the time of the tipping over of the same as aforesaid,

and therefore reserving the right to claim the benefit of any faults causing such tipping over which may result on a full hearing herein, on information and belief alleges that said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company, in addition to their negligent and wrongful conduct above set forth, were guilty of the following specific faults which caused said steamer so to tip over:

1. Said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company were negligent in using a steamer which was, and which they knew, or by the exercise of proper care would have known to be, unsafe and unseaworthy.

2. That they were negligent in permitting a large number of passengers to board said steamer without attending to their duty to see that proper precautions were taken to protect said passengers from harm and injury.

3. That they were negligent in allowing a larger number of passengers to board said steamer than could safely and properly be carried thereon.

4. That they were negligent in not providing proper and competent servants to manage, control and operate said steamer.

5. That they were negligent in not providing sufficient employees to properly manage, control and operate said steamer.

6. That they were negligent in not providing proper ballast tanks and other apparatus and appliances to prevent said steamer tipping over.

7. That they were negligent in improperly operating, controlling and managing the ballast tanks.

apparatus and appliances which were provided on said steamer.

8. That they were negligent in allowing a large number of passengers to board said steamer, and in moving and attempting to move said steamer with the ballast tanks thereon partially or wholly unfilled with water.

9. That they were negligent in disconnecting the ropes and cables by which said steamer was attached to its dock.

10. That they were negligent in moving and in attempting to move said steamer when it was, and when they knew, or by the exercise of proper care would have known, that it was in an unsafe and improper condition to be moved.

11. That they were negligent in moving and in attempting to move said steamer in an unsafe and improper manner.

12. That they were negligent in allowing and in ordering said tug boat "Kenosha" to move and tow, and to attempt to move and tow, said steamer when said steamer was, and when they knew, or by the exercise of proper care would have known, that said steamer was in an unsafe and improper condition to be moved and towed.

13. That they were negligent in ordering and in allowing said tug boat "Kenosha" to move and tow and to attempt to move and tow said steamer under unsafe and improper conditions and in an unsafe and improper manner.

14. That they were negligent in not warning and ordering the passengers on said steamer to leave and disembark therefrom when they, said compa-

nies, knew, or by the exercise of proper care would have known, that it was unsafe and dangerous for such passengers to remain thereon.

15. That they were negligent in allowing passengers to board said steamer when they, said companies, knew, or by the exercise of proper care would have known, that it was dangerous and unsafe for such passengers to board same.

16. That they were negligent in permitting a large number of passengers to board said steamer without previously having had said steamer properly inspected and tested to determine whether such steamer was properly constructed and equipped and in proper condition to safely allow such large number of passengers to be thereon.

17. That they were negligent in permitting a large number of passengers to board said steamer when said steamer was not, and when they, said companies, knew, or by the exercise of proper care would have known, that said steamer was not properly constructed and equipped and in proper condition to safely allow such large number of passengers to be thereon.

18. That they negligently permitted a large number of passengers to board said steamer without having proper inspections and tests made to determine whether it was sufficiently stable and in proper condition to safely allow such number of passengers to be thereon, and permitted such large number of passengers to board same when it was not, and when they, said companies, knew, or by the exercise of proper care would have known, that it was not

sufficiently stable and in proper condition for such purpose.

19. That they negligently failed to provide sufficient and proper life-saving apparatus and equipment on board said steamer for the number of passengers permitted by them to board, and who did board, the same, and negligently failed to have properly accessible for such passengers such life-saving apparatus and equipment as was provided thereon.

20. That they negligently failed to use proper care to protect from harm and injury the passengers permitted by them to board said steamer, when they, said companies, knew, or by the exercise of proper care would have known, that the condition of said steamer was such that it was in danger of tipping over.

21. That they negligently permitted said steamer to be overloaded with a great amount of freight and supplies and other paraphernalia in addition to the large number of passengers permitted by them to be thereon, without taking proper precautions and exercising proper care to make said steamer stable and safe under such conditions for said passengers.

22. That they were warned of the danger of said steamer tipping over a sufficient length of time before it did tip over to have enabled them by the exercise of proper care to cause all or a portion of said passengers to safely disembark from said steamer before it tipped over and prevent it from tipping over, yet they carelessly, negligently and wilfully and wantonly failed to heed such warnings and to exercise such care.

SIXTH. And said Dunham Towing and Wrecking Company, in addition to its negligent and wrongful conduct above set forth, was guilty of the following specific faults which caused said steamer to tip over as aforesaid:

1. It negligently attempted to move and tow, and did move and tow, said steamer when it was not, and when it, said company, knew, or by the exercise of proper care would have known, that said steamer was not in a safe and proper condition to be moved and towed.

2. It negligently attempted to move and tow, and did move and tow, said steamer in an improper and unsafe manner.

3. It negligently managed, operated and controlled its said tug boat "Kenosha" while same was attached to said steamer.

SEVENTH. And libelant, on information and belief, further alleges that said Earl H. Dawson, deceased, left him surviving next of kin as follows: William Dawson, his father, Edward Nathaniel Dawson, his brother, and Lillian Edna Dawson, his sister, who are still living; and by reason of the death of said Earl H. Dawson, deceased, as aforesaid, his said next of kin have been and are deprived of their means of support and have been pecuniarily injured as a direct result of the death of said deceased.

Wherefore your libelant prays that process in due form of law according to the course and practice of this Honorable Court may issue against said St. Joseph-Chicago Steamship Company, a corporation, said Indiana Transportation Company, a corporation, and said Dunham Towing and Wrecking Com-

pany, a corporation, and that said St. Joseph-Chicago Steamship Company, a corporation, said Indiana Transportation Company, a corporation, and said Dunham Towing and Wrecking Company, a corporation, may be cited to appear and answer all and singular the allegations of this libel, and that upon final hearing this Honorable Court may find in favor of libelant's claim herein and decree payment thereof with interest and costs, and that this Honorable Court may grant such other and further relief as libelant may be entitled to receive in the premises.

JAMES F. BISHOP,
Administrator of the Estate of Earl H. Dawson, Deceased, Libelant.

HARRY W. STANDIDGE,
Proctor for Libelant.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

James F. Bishop, being duly sworn, says that he is administrator of the estate of Earl H. Dawson, deceased, libelant herein; that he has read the above and foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be alleged on information and belief, and as to such matters affiant believes it to be true.

JAMES F. BISHOP.

Subscribed and sworn to before me this 20th day of August, A. D. 1915.

IRA W. HURLEY,
(Seal) *Notary Public.*

Endorsed; filed August 21, 1915.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

James F. Bishop, Administrator of the estate of Earl H. Dawson, deceased,
vs.
St. Joseph-Chicago Steamship Company *et al.*
} No. 32236.

And now comes the Indiana Transportation Company, one of the defendants in the above entitled cause, and files its exceptions to the libel in said cause:

1st: That the said libel is based upon a right of action which does not exist under the maritime laws of the United States and that therefore this court has no jurisdiction of the cause of action stated in the libel.

2nd: That the said libel does not state any damages suffered by the libelant or those whom he represents.

C. E. KREMER,
Proctor for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

James F. Bishop, Administrator of the estate of Earl H. Dawson, deceased, *et al.*
vs.
St. Joseph-Chicago Steamship Company, a corporation, *et al.*
No. 32236.

And now comes the Indiana Transportation Company, one of the respondents above named, and excepts to the amended libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, in the following particulars:

1st: That the said amended libel is informal, contrary to the admiralty rules and procedure and contrary to law because it joins with the original libelant 373 additional libelants who have a separate and distinct cause of action from that of the original libelant and are therefore improperly joined.

2nd: Because the above named respondent cannot in law in this case be called upon to answer the said amended libel as to 373 additional libelants.

3rd: In all of which particulars the said amended libel is imperfect and insufficient and that the said respondent is not bound to answer the same as to the 373 additional libelants improperly joined to the original libel.

INDIANA TRANSPORTATION COMPANY,
By C. E. KREMER,
Its Proctor.

C. E. KREMER,
Proctor for Indiana Transportation Co.

Sr

INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

In the Matter of the Petition of THE INDIANA TRANSPORTATION COMPANY for a Writ of Prohibition.

BRIEF IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

The Indiana Transportation Company was originally made one of the defendants in the suit of the original libelant, James F. Bishop, as the administrator of the estate of Earl H. Dawson, deceased, in the District Court for the Northern District of Illinois in admiralty.

The libel was *in personam* to recover on a claim arising under the statutes of Illinois for causing the death of Earl H. Dawson, and the Indiana Transportation Company was duly served with process in that suit, by service upon its agent, who was, at that time, within the State of Illinois.

Almost a year thereafter, viz: on the 24th day of July, 1916, three hundred seventy-three other claims were given leave to be added to the original claim

in the libel of James F. Bishop, administrator of Earl H. Dawson, deceased, and after overruling its exceptions to this the Indiana Transportation Company was ruled to answer these additional claims. Over three hundred of these arose on separate death claims against the Indiana Transportation Company under the Illinois death statute, and the remainder were for personal injuries or the destruction of property, arising out of the same disaster. No new service was ever had on any of these claims, and at the time they were allowed to be joined as co-libelants, the Indiana Transportation Company had no one within the Northern District of Illinois upon whom service could be had and was not doing business there.

The Judge's order would result in compelling the Indiana Transportation Company to defend itself in a court outside of its own domicile, and without any service, against three hundred and seventy-three new claims, aggregating a possible liability of over three millions of dollars.

No attempt has ever been made to issue any process on any of these claims, nor was any process issued, or effort made in any way to get jurisdiction over the Indiana Transportation Company. No property was ever libelled, seized or attached in this suit. The Indiana Transportation Company has no property within the Northern District of Illinois, or anywhere in the State, and is doing no business within the Northern District of Illinois, nor was it doing any at the time the amended libel was filed, and was not, at that time, subject to service within the North-

ern District of Illinois, or at any time subsequent thereto.

The Indiana Transportation Company, therefore, has filed its petition for a writ of prohibition stating that the District Court is without jurisdiction in any of the three hundred seventy-three additional claims filed and joined to the original case of Bishop, administrator of Earl H. Dawson, deceased.

I.

The writ of prohibition should issue whenever a lower court is proceeding without jurisdiction either of the subject matter or of the person.

Sec. 234, Judicial Code.

2nd Inst., 202, Lord Coke.

Quimbo Appo v. *People,* 20 N. Y., 531.

Ex parte Williams, 4 Ark., 537; 38 Am. Decisions, 46.

Works on Courts & Jurisdiction, 64.

Penn. Co. v. *Rodgers,* 52 W. Va., 450.

State of Wash. v. *Superior Court,* 15 Wash., 500.

Stuperich Co. v. *Superior Court,* 55 Pac. Rep., 984.

People v. *Wayne Circuit Court,* 26 Mich., 100.

People v. *Inman,* 74 Hun, 130.

Howard v. *Pierce,* 38 Mo., 296.

State v. *Mitchell,* 2 Bailey, 225.

II.

The District Court of the Northern District of Illinois has no jurisdiction of the 373 claims in the amended libel, because there has been no service on the Indiana Transportation Company, and as all these claims are suits *in personam,* jurisdiction can only be acquired by personal service.

Boswells, Lessis v. *Otis,* 9 How., 336.

Scott v. *McNeal,* 154 U. S., 34.

Old Wayne Life Ass'n v. *McDonough,* 204 U. S., 8.

Hovey v. *Elliott*, 167 U. S., 409.
Galpin v. *Page*, 18 Wallace, 350.
Roller v. *Holly*, 176 U. S., 398.
Hart v. *Sansom*, 110 U. S., 151.
Leigh v. *Green*, 193 U. S., 79.
Brooklyn v. *Insurance Co.*, 99 U. S., 362.
Pana v. *Bowler*, 107 U. S., 529.
Webster v. *Reid*, 52 U. S., 436.
Bischoff v. *Wethered*, 76 U. S., 812.
Hollingsworth v. *Barbour*, 29 U. S. (4 Pet.), 466.
Knowles v. *Gas Light & Coke Co.*, 86 U. S., 58.
Pennoyer v. *Neff*, 95 U. S., 714.
Riverside Mills v. *Menefee*, 237 U. S., 189.
Simon v. *Southern Railway*, 236 U. S., 115.

III.

There is nothing in the procedure in admiralty courts which gives the court jurisdiction of suits *in personam*, where there is no service on the defendant.

The Oregon, 158 U. S., 186.
Steamship Zodiac, 5 Fed. Rep., 220.
Walker v. *Hughes*, 132 Fed. Rep., 885.
The Willamette, 70 Fed., 874.
The Nahor, 9 Fed., 213.

IV.

In admiralty cases arising on the Great Lakes, such as the present case, the defendant is entitled to a jury trial, and the court below was without jurisdiction to deprive it of this right by joining 374 separate suits in one libel.

Sec. 566, Revised Statutes, U. S.
The Nyack, 199 Fed., 383.
The Western States, 159 Fed., 354.

ARGUMENT.

I.

THE WRIT OF PROHIBITION IS THE PROPER REMEDY WHENEVER THE LOWER COURT IS PROCEEDING WITHOUT JURISDICTION.

This petition asks for the issuance of the writ of prohibition under Section 234 of the Judicial Code, which provides:

> "The Supreme Court shall have power to issue writs of prohibition to the District Court when proceeding as courts of admiralty and maritime jurisdiction."

Lord Coke (2 Inst., 202) said:

> "Prohibitions by law are to be granted at any time to restrain a court to intermeddle or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary. And it is the folly of such as will proceed in the ecclesiastical court, for that whereof that court hath not jurisdiction, or in that whereof the King's temporal court should have the jurisdiction, and so themselves (by their extraordinary dealings) are the cause of such extraordinary charges, and not the law; for their proceedings in such cases are *coram non judice*, and the King's courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same as well after judgment and execution as before."

In the case of *Quimbo Appo* v. *The People*, 20 N. Y., 531, the Court of Appeals said:

> "The office of this writ is, to restrain subordinate courts and inferior judicial tribunals of every kind from exceeding their jurisdiction. It is an ancient and valuable writ, and one the use of which in all proper cases should be upheld and encouraged, as it is important to the due and regular administration of justice that each tribunal should confine itself to the exercise of those powers with which, under the Constitution and laws of the State, it has been intrusted.
>
> "But it is said, that when the inferior court or tribunal has jurisdiction of the action, or of the subject matter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition.
>
> "It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case. Mr. Jacob in treating of this writ, after saying that it may issue to inferior courts of every description, whether ecclesiastical, temporal, military or maritime, whenever they attempt to take cognizance of causes over which they have no jurisdiction, adds: 'Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy.'"

For a further history of the writ of prohibition, we refer to the case of *Ex parte Williams*, 4 Ark.,

537; 38 Am. Decs., 46. This case was decided in 1842, and the court reviews the history, purpose and scope of the writ of prohibition and cites numerous English cases in which the writ had been issued, and for what purpose it was issued.

Should it be desirable or necessary to look into the early history of this ancient writ, this case will furnish much interesting and valuable information. We deem it unnecessary to quote from the decision.

There is statutory authority for issuing this writ, and therefore it is unnecessary to inquire on that subject. That the writ may issue in cases where the jurisdiction of the court as to the subject matter is the inquiry is practically conceded. In this case it is not a question of the court's jurisdiction of the subject matter, but the question of the courts having no jurisdiction of the petitioner in 373 cases in the amended libel.

Works on Courts and Jurisdiction, page 634:

> "Prohibition will lie to prevent action where the court has not jurisdiction of the person as well as in cases where there is absence of jurisdiction of the subject matter."

Penn Co. v. *Rogers*, 52 W. Va., 450:

In that case the court held that the writ of prohibition should have been issued because the court had no jurisdiction over the parties defendant by proper service of process.

State of Washington v. *Superior Court*, 15 Wash., 500:

In this case the Superior Court ordered the defendant to appear and answer, otherwise to suffer

default and judgment. The court held that the lower court must proceed by the service of process to bring in the defendant, and that a mere order of court was not sufficient without the service of process, and it therefore issued the writ of prohibition.

Stuperich Co. v. *Superior Court,* 55 Pac. Rep., 985:

In this case a receiver was ordered to take possession of certain property, which was in possession of petitioner under claim of title of ownership, the writ of prohibition was issued against the Superior Court because the petitioner, not being a party in the Superior Court, could not be summarily dispossessed of his property without a hearing and a trial by jury.

People v. *Wayne Circuit Court,* 26 Mich., 100:

In this case summons was issued against a non-resident defendant not found in the State. A garnishee summons was then taken out, directed to Monroe County and served there. Notice of proceedings was served by mail on principal defendant, in New York. The Supreme Court of Michigan issued the writ of prohibition because there was improper and not legal service on the defendant.

People v. *Inman,* 74 Hun, 130:

In this case the defendant was in attendance in the County and a party to an action pending in the Superior Court of Montgomery County. While there, a summons from a Justice Court was served upon him. The Supreme Court issued the writ of prohibition against the Justice of the Peace pro-

hibiting him from proceeding against the defendant because of improper service, and this was affirmed.

Howard v. *Pierce,* 38 Mo., 296:

In this case the writ went to the County Court for exceeding its jurisdiction in an ejectment case.

State v. *Mitchell,* 2nd Bailey, 224:

In this case the Ordinary ordered the Sheriff of the County to take certain slaves, the property of a deceased person, into custody. Prohibition against this action was prayed for and granted by the Supreme Court, the court saying:

> "It is not necessary to refer to Magna Charta or our Constitution, for the rule that no one be disseized of his freehold, despoiled of his goods or deprived of his liberty or life without being heard, or otherwise than according to law. It is being a rule of common right and in some shape or other is engrafted upon the constitution of every civilized country."

There is, therefore, no question upon the proposition that the court has under the statute the right to issue the writ of prohibition, and that the writ can go as well in cases where the court sought to be restrained exceeds its jurisdiction over the person, as in cases where the court is without jurisdiction of the subject matter brought to it. The reason for the rule is the same in both cases, namely, viz: to prevent doing that which is invalid, and which therefore should be prevented, saving time and expense to the parties litigant.

II.

THE COURT BELOW IS PROCEEDING WITHOUT JURISDICTION OVER THE DEFENDANT, THE INDIANA TRANSPORTATION COMPANY, BECAUSE THIS IS A SUIT IN PERSONAM AND THERE HAS BEEN NO SERVICE ON THE DEFENDANT AS TO THE 373 NEW CLAIMS WHICH HAVE BEEN ADDED TO THE ORIGINAL LIBEL.

The proceeding in the Northern District of Illinois was purely a proceeding *in personam*. No property was libelled, seized or attached. The original libel was a proceeding *in personam* with personal service. The amended libel represented separate suits by separate claimants and had no connection with the original libel, except that the cause of action arose at the same time. The great majority of them arose from the alleged negligent conduct in causing death for which under the Statute of the State of Illinois there was a right of action. While the court of admiralty could be used as a forum, in which to try these actions, they were, strictly speaking, actions arising under the law of Illinois, growing out of an alleged maritime tort.

The effect of the ruling of Judge Landis, allowing the joining of these claims with that in the libel of Bishop, representing Earl H. Dawson, was to give the Federal Court personal jurisdiction over the Indiana Transportation Company, without service on it in any way, shape, form or manner.

This was beyond the power and jurisdiction of the court to do, and therefore any judgment or decree rendered thereon would be void, under the universal principle that all judgments *in personam* must be based on personal service on the defendant.

That this is the universal principle has been stated many times by this court. It has clearly laid down the difference between actions *in personam* and actions *in rem,* and has always held that all judgments *in personam* must be based on personal service.

One of the earliest cases making this distinction is *Boswell* v. *Otis,* 9 Howard, 336. The court there held the judgment of the State Court void because it was a judgment *in personam,* without personal service. The court said (page 348):

> "When the record of a judgment is brought before the court collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. *And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem. Boswell* v. *Otis,* 9 Howard, 336."

This general principle has been reiterated again and again by this court as one of the fundamental principles of our jurisprudence, and it has arisen in various forms. In the case of *Galpin* v. *Page* a judgment *in personam* was held void when the personal service was made only on the partner of the defendant. (85 U. S., 350.) The general rule was there strongly set forth by the court, as follows (page 368):

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. *It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is justly administered.*"

Most of the cases have arisen in cases of State Court judgments, which were claimed to be without due process of law. This court has always said, that any judgment rendered without jurisdiction, over the defendant, was without due process of law under the Federal Constitution. One of the leading cases is the case of *Pennoyer* v. *Neff*, 95 U. S., 714, which reviews all the prior decisions. The court discussed the fundamental principle of law and quoted from the opinion of Mr. Justice Story in *Picquet* v. *Sawn*, page 724, as follows:

> "Where a party is within a territory he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice.*"

And later on (page 733) the court set forth a rule concerning due process of law:

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution, that is, by the law of its creation, to

> pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

In the case of *Webster* v. *Reid,* 11 Howard, 459, there was a judgment against a large number of defendants in the State Court of Iowa. The defendants were served through the newspapers, as owners of "half breed" lands. This court held the judgments absolutely void for all purposes, and Justice McLean sets forth the rule in sweeping terms near the close of his opinion:

> "By the act under which the suits were instituted no other designation of the defendants was required than 'Owners of the Half Breed Lands lying in Lee County.' These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit, on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities and did not authorize the execution on which the land was sold."

Another leading case is the case of *Scott* v. *McNeal,* 154 U. S., 34, in which a personal judgment was held void where there was no personal service. The decision is interesting, because on page 46 Mr. Justice Gray, in his opinion, stated that the courts

of admiralty were subject to the ordinary rules of jurisdiction:

> "Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The May,* 9 Cranch., 126, 144; *Hollingshead* v. *Barbour,* 4 Pet., 466, 475; *Pennoyer* v. *Neff,* 95 U. S., 714, 727. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, 'unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.' *Rose* v. *Himely,* 4 Cranch., 241, 269. Upon the same principles a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer taking the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. *Thompson* v. *Whitman,* 18 Wall., 457."

The court in that case held the judgment without service void on the authority of *Pennoyer* v. *Neff,* cited above.

Two other cases which fully discuss all the authorities are *Goldie* v. *Morning News,* 156 U. S., 518,

and *Cooper* v. *Newell*, 173 U. S., 555. In both these cases there is an elaborate collection and citation of authorities.

In the case of *Leigh* v. *Green*, 193 U. S., 79, this court held a certain proceeding *in rem* good on publication, and in his opinion Justice Day made a distinction between proceedings *in personam* and proceedings *in rem*, as follows (page 91):

> "When the proceedings are *in personam* the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment."

Within the last year this court again laid down this general principle in the case of *Simon* v. *Southern Railway*, 236 U. S., 115, and also in the case of *Riverside Mills* v. *Manifee*, 237 U. S., 189. In the latter case Justice White said (page 193):

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement. Equally well settled is it that the courts of one state cannot without a violation of the due process clause extend their authority beyond their jurisdiction so as to condemn the resident of another state, when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in *Pennoyer* v. *Neff*, 95 U. S., 714, and has been without deviation upheld by a long line of cases, a few of the leading ones being cited in the margin. And that a corporation no more than an

> individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in *Pennoyer* v. *Neff* is also established by the cases referred to and many others."

The principle herein contended for is, therefore, shown to be one of fundamental justice, and it is unimportant whether a suit be in admiralty or in law. The distinction in admiralty, as well as in law, between a proceeding *in personam* and a proceeding *in rem* is universally recognized. Apparently no Judge has ever before attempted to acquire jurisdiction of a defendant in the method followed in the present case, yet we are not entirely without precedent in this matter in admiralty cases.

III.

THERE IS NOTHING IN ADMIRALTY LAW WHICH CAN GIVE A COURT JURISDICTION IN A CASE OF THIS CHARACTER WITHOUT PERSONAL SERVICE.

It is admitted that it is not unusual to join a number of libelants in admiralty, but that, in no way, obviates the necessity of having the defendant before the court.

The first case on this subject reported in the books is the case of *Am. Ins. Company* v. *Johnson*, Fed. Cas., 303. In that case a libel was filed *in personam* in behalf of ten marine insurance companies against the defendant, Charles Johnson. The libelants were underwriters on a cargo of the Brig Hercules, and suit was brought by them jointly because of the misconduct of Johnson in rendering salvage services to the brig, which resulted in her sale, etc.

The justification for joining the libelants was found in that they were all underwriters on the same cargo, for the same voyage, and they were unable to determine how much each one of the different consignments covered by the different underwriters, had been injured and damaged by the misconduct of the defendant, etc. They were all allowed to join as libelants.

It is to be noted that all the libelants in this case joined in the libel as it was originally filed so that the defendant was before the court for all purposes and the jurisdictional question involved here was not in any way involved.

This case is cited in support of the text in Benedict's Admiralty, Section 309, page 219, which statement is as follows:

> "The party really entitled to the relief should always be made libelant, and all persons whose interests rest upon a cause of action common to all may join in one libel, but among themselves their interests are distinct."

This statement cannot be construed as justifying the present ruling of the court as the author is obviously only speaking of cases where the defendant must be served as to all of the libelants, and is, in no way, discussing the jurisdictional point involved here. In fact, we believe that the present case is one of first impression and the point has never been raised before in any of the cases.

In the above statement in Benedict the author cited the case of *Am. Ins. Co.* v. *Johnson, supra*, also the case of *Jacobson* v. *Dallas*, as authority. In the latter case Judge Ballinger, in the Oregon District,

held that Jacobsen, who sued for the loss of his vessel and other property, and for personal injuries in common with Dresser, as administrator of the estate of Hanson, who lost his life, and Ford, who claimed to have sustained personal injuries, all arising out of the misconduct of the Steamer Sarah Dickson. This is the only case *in personam* in the books that goes to the length of joining separate causes of action *in personam,* and in this case also, all the libelants joined in the original libel so that service on the defendant was had for all the claims and the defendant was before the court as to all the libelants, and, therefore, the jurisdictional point was not in any way involved in that case for it is not considered by the court's opinion.

We next find the case of *The Oregon,* 133 Fed. Rep., 653. This is a case similar to the case of *The Prinz Georg,* and was to recover damages under the Federal statute for failing to supply proper food and quarters to passengers on a voyage from Nome to Seattle. The proceeding was *in rem,* and, therefore, as the *res* was before the court, the court had jurisdiction of it for all purposes and allowed all the passengers to join in the libel.

Benedict proceeds in Section 310 to say that in all salvage cases and for violation of passenger agreements and other cases in which many persons may concur in asking damages for the same general cause, it is the uniform practice for all to enter in the same suit. In support of this the author cited the case of *The Prinz Georg,* 19 Fed., 653, and *Jacobson* v. *Dalles P. & A. N. Co.,* 93 Fed., 976, and also *Sun M. I. Co.* v. *Miss. Valley T. Co.,* 14 Fed., 699.

The case of *The Prinz Georg* a number of passengers joined in a proceeding *in rem* against a passenger steamer to recover statutory penalties provided by the act of Congress for a violation of the act relating to the treatment of passengers on passenger steamers. In that decision the court said:

> "In other suits the ruling might be different, but in a proceeding *in rem* in the admiralty this is not irregular or unauthorized and the exception must be overruled."

This case was affirmed by the Circuit Court in 23 Fed., 906.

As this was a suit *in rem* there can be no question whatever but that the decisions of the courts were correct. The only other case in which suit *in personam* is the case of *Sun M. I. Co.* v. *Miss. V. T. Co.*, 17 Fed., 919, and in this case also, a number of shippers were allowed to join as libelants in an action *in personam* as they all joined in the original libel, and service on the defendant would naturally bring it into court for all libelants and no jurisdictional defect could be urged.

It will be noted that in no one of these cases was the jurisdictional point involved. In every case which was *in personam* all the libelants joined in the original libel so that service on the defendant brought it into court to defend against all the libelants and the court, therefore, had jurisdiction *in personam* on proper service.

There is no pretense in any of these cases that a court of admiralty can get jurisdiction of new cases *in personam* without service, and we have discussed the cases in full because we believe it was upon the

statements contained in Benedict, and the cases there cited, that the District Judge based his rulings in the court below.

In particular we believe he relied on the statements in Benedict's Ad., 221, which reads as follows:

> "Where a libel has been filed, and another party has a claim arising out of the same transaction, the proper practice is for him to present a petition to be made a co-libelant. This has been held in reference to seamen, to salvors, to owners of a cargo damaged, and to insurers who have paid a loss where a libel had been filed by the owner of the vessel or the carrier."

It will be noted that Benedict, in none of his statements, covers the point herein involved, which allows subsequent libelants to join, and requires the defendant to answer without service.

There are, however, a number of cases in admiralty which tend to show the courts of admiralty are bound by the ordinary rules of service in order to acquire jurisdiction of the defendant.

In *Walker* v. *Hughes,* 132 Fed., 885, which is an admiralty suit, service was made on the defendant by leaving a copy of a citation with a servant at the defendant's residence, and it was held that in order to give the court jurisdiction there must be personal service, or attachment of defendant's property. The court said, "It would be a dangerous proceeding to allow a judgment *in personam* to be obtained without personal service or attachment."

In the case of *Long Island, etc., Trans. Co.,* 5 Fed., 599, the court held that where an amended libel filed

in a suit had a new cause of action, new service upon the filing of that amended libel should be had.

The most interesting case, however, is the case of *The Oregon,* 158 U. S., 186. That suit was originally a libel under which a vessel was attached. It was a suit *in rem.* The vessel was released on stipulation or bond and afterwards other libelants intervened on other claims and the question was whether the bondsman could be held. The court held, as follows:

> "If a vessel is still in custody when the intervening petition is filed, the vessel cannot be released until the stipulation is given to answer all the libels on file. But, if, after the stipulation is given, and the vessel is discharged from custody, other libels are filed, a new warrant of arrest must be issued and the vessel again taken into custody."

This case is extremely interesting because it shows that courts of admiralty are bound by the same fundamental principles of jurisdiction herein relied on. If this were a suit *in rem* and the vessel were still before the court, intervening petitioners could come in at any time, but if the vessel were released on bond, the sureties were liable on their bond, and they were only liable for the amount in suit then before the court, and, if intervening libelants thereupon came in, new service would have to be had. This is the universal rule in admiralty, and shows clearly that the courts of admiralty follow the fundamental principles of our jurisprudence. In fact, should a court of admiralty attempt to transgress it, it would be contrary to the constitutional requirements of due process of law.

This case has been followed in the case of the *Willamette*, 70 Fed., 874, in which case Judge McKenna set aside a judgment rendered in favor of intervening libelants on personal injury claims. The judgments were not even allowed to stand against the owners or claimants of the vessel.

The injustice of the ruling of the court below is manifest. Suppose the Indiana Transportation Company had defaulted on the claim of Earl H. Dawson, deceased? Can it be seriously contended that the District Judge could have amended the libel and entered a default for four million dollars on the original service for a claim of ten thousand? Yet, if the present ruling is to stand, and the District Court for the Northern District of Illinois has jurisdiction of the defendant, this must be the inevitable result.

It is true that in a number of cases courts of admiralty have allowed the original libel to be amended by allowing intervening petitions to be filed in the case of the original libel, and at times this has been done in suits *in personam* as well as in suits *in rem*, but in no case has the present jurisdictional point arisen. In all the cases there has always been either proper service on the defendants, or else the defendants being within the jurisdiction and subject to service, have waived the requirements of service and acceded to the jurisdiction of the court by going to trial. We do not believe that there is any case of record like the present, where an admiralty court has assumed jurisdiction without process over the objection of the defendant, and allowed new claims to intervene without process when

the defendant could not be reached by process, and there was objection to the jurisdiction of the court.

We submit that there is no doubt that this is clearly without jurisdiction. If jurisdiction can be maintained in this way in admiralty it can be done in a court of common law, and it would follow that if a non-resident defendant has one case pending in a court in which service has been obtained, he can be subjected to the jurisdiction of that court in all subsequent litigation without further service of process. This result is opposed to all fundamental principles of law.

No one will contend that a joinder like this could be made in a common law court. Why should it be permitted in an admiralty court? The constitutional right of due process of law is as much a right in one court as another. It governs in all courts.

IV.

THE COURT BELOW HAD NO JURISDICTION TO JOIN ALL THE LIBELANTS IN ONE SUIT, BECAUSE EACH PARTY HERE IS ENTITLED TO A JURY TRIAL AND THERE MUST, THEREFORE, BE A SEPARATE TRIAL FOR EACH CLAIM AND THE JOINDER OPERATES TO DEPRIVE THE DEFENDANT OF ITS RIGHT TO A JURY TRIAL.

There is no trial by jury in admiralty cases except in cases arising upon the Great Lakes and the waters connecting them. Benedict's Admiralty, Sec. 262, the author says:

> "The District Courts, in the exercise of their admiralty jurisdiction, have the three great classes of functions:
>
> "They are Instance Courts, in which are heard and determined civil suits of a maritime

> character between party and party. As instance and prize courts all cases are heard and determined by the court alone, without the aid of a jury."

This would be true if it were not for a class of cases arising on the Great Lakes. Sec. 566, Rev. Stat. U. S., provides:

> "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. *In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories* upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

This case is clearly within this statute. The Steamer Eastland was of more than twenty tons burden, was enrolled and licensed for the coasting trade and at the time of the disaster was bound on a voyage from Chicago, Illinois, to Michigan City, Indiana, by way of Lake Michigan.

The original statute (February 26, 1845, 5 St. at Large, 726) was passed to confer admiralty jurisdiction in cases of contract and tort arising upon the lakes and navigable waters connecting the lakes. When this act was passed it was thought that there was no admiralty jurisdiction upon the Great Lakes,

due mainly to the fact that there was no tide there. In this act there was inserted the following words:

> "Saving, however, to the parties the right of trial by jury of all facts put in issue in such suits where either party shall require it."

The Act of 1845 was first considered by the Supreme Court in the case of *The Genesee Chief*, 12 How., 443. The court in this case sustained the admiralty jurisdiction in a case of collision which arose upon the Great Lakes, and subsequently in the case of *The Eagle*, 8 Wall., 15.

The court said as to this act:

> "It is an act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same. At the time it was enacted it had the effect expressed and intended, and so continued for some seven years, when the case of *The Genesee Chief* was decided. From that time its effect ceased as an enabling act; and has been no longer regarded as such. It is no longer considered by this court as conferring any jurisdiction in admiralty upon the District Courts over the lakes, or the waters connecting them. That is regarded as having been conferred by the grant of general admiralty jurisdiction by the 9th section of the Act of 1789 to these courts. The original purpose of the act, therefore, has ceased, and is of no effect; and in order to give it any, instead of construing it as extending the jurisdiction in admiralty, it must be construed as limiting it—the very reverse of its object and intent, as expressed on its face."

In revising the statutes in 1878 the statute of 1845 was left out of the revision, but the clause relating to jury trials was left in, so that it is well settled at

this time that either side has a right to a jury trial in a case of this character.

Considerable controversy has arisen in the courts upon the question of whether a jury trial in admiralty under this statute was like a jury trial at common law, or like a trial of an issue out of chancery. The leading case supporting the latter view is *Gillett* v. *Pierce,* Fed. Cas. 5437. It was decided by Judge Longyear at Detroit and Mr. H. B. Brown, the late Justice of this court, was the proctor for the libelant and opposed to the jury trial. The court held that the verdict of a jury under this statute was advisory only, although the question did not properly arise in the case, because it was not a case coming within the statute. This decision has been followed in a number of cases. The question is still open in this court.

Passing over the many decisions in which this question has been considered, and coming directly to the case of *The Nyack,* 199 Fed., 383, decided by the Court of Appeals of the Seventh Circuit, Judge Sanborn writing the opinion. In that case there was a verdict by a jury in an admiralty case under this statute.

The court held that although the Circuit Court of Appeals could try an admiralty appeal on the Great Lakes *de novo,* yet the District Court should grant a jury trial on the request of either side and that the jury trial should be held binding on the Judge of the District Court. On page 389 Judge Sanborn says:

> "Following the settled rule of this circuit, therefore, the questions of fact and law involved

in an admiralty appeal come to us substantially as they do to the District Judge. He may order a jury trial in cases on the Great Lakes and connecting waters, under the Act of 1845, when either party so requests, provided the vessel be engaged in interstate commerce. Whether the verdict shall be treated by the District Court as advisory only, or as binding, may be doubtful; but, however this may be, it is entirely settled that the Circuit Court of Appeals may review the whole case as if it were originally brought there, except that it will not reverse where the evidence is conflicting as a general rule. From the decisions of the Supreme Court in *The Genesee Chief,* 12 How., 443; 13 L. Ed., 1058, and *The Eagle,* 8 Wall., 15; 19 L. Ed., 365, it would appear that the verdict of a jury is binding on the trial court unless set aside under some rule applying generally to jury trials. This view is taken by the Circuit Court of Appeals of the Second Circuit in *The Western States, supra.* At all events the District Court has power to adopt the verdict as it did by its decree, although it is not binding on appeal, except in the limited sense referred to."

The Western States, 159 Fed., 354:

This was an appeal from the verdict of the jury in an admiralty case which was tried in the District Court for the Western District of New York, the cause of action arising on the Great Lakes. The court reviewed the authorities and notably those relating to whether or not the verdict of a jury in admiralty was advisory, and concludes as follows:

"We do not discover anything in this case or in two others cited by Judge Brown which justified the conclusion that verdicts rendered under Sec. 566 are advisory only. The two other cases cited were *Lee* v. *Thompson,* 3 Woods,

167; Fed. Cas. No. 8202, in which everything Judge Bradley said about jury trials was with reference to feigned issues for the enlightenment of the court, and *Basey* v. *Gallagher,* 20 Wall., 670; 22 L. Ed., 452, which was an action in equity, for an injunction only, in which Justice Field held that the statute of Montana allowing only one form of civic action, and providing that 'issues of fact shall be tried by jury unless a jury is waived or a reference ordered,' was not intended to abolish the difference between legal and equitable actions. He said:

" 'But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought to be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment, respecting them, and not from the judgment of others.'

"Judge Longyear, in *Gillett* v. *Pierce,* Brown's Admiralty, 553; Fed. Cas. No. 5437, held that Section 566 did not apply at all, because the pleadings did not show that the vessel involved was enrolled or licensed for the coasting trade. In his very interesting discussion of that section he simply suggested that Congress should legislate to make the jury trials advisory only. It is true that Judge Ricks, in *The City of Toledo* (E. C.), 73 Fed., 220, did hold such verdicts advisory only because he thought any other construction would be a curtailment of the power of the admiralty Judge. This does

not seem consistent with the view of the Supreme Court in *The Genesee Chief, supra,* which treats the provision as a mere regulation of practice, and was not necessary to be decided because the learned Judge found the vessel did not fall within the provisions of Section 566."

When the Act of 1845 was passed it was thought that cases arising on the Great Lakes were not within the jurisdiction of the admiralty courts, and were therefore within the jurisdiction of the common law courts only. In granting to the admiralty courts jurisdiction, a provision for a jury trial was added out of fear that if this was not done the parties would not be obtaining their constitutional rights of trial by jury. There was no thought of any other than a jury trial according to the common law, such as is provided in the Constitution. The courts were not conferring equity jurisdiction upon the admiralty courts by the Act of 1845, but admiralty jurisdiction with a right to a common law jury trial. No other kind of a jury trial could have been in contemplation and the Act of February 26, 1875, particularly recognized the right of trial by jury in admiralty cases, in that way re-establishing what had been provided thirty years before in the Act of 1845.

Even though the Act of 1875 may have been repealed by the Court of Appeals, Act of 1891, this does not affect the right of a trial by jury under the Act of 1845, in cases arising on the lakes; nor does it weaken the argument that a full jury trial was provided by the Act of 1845.

This case is clearly within the Act of 1845, and under this the parties are entitled to a jury trial in

each of these cases on all of the issues of liability as well as of damage, and that is another reason why libelant cannot join other libelants with different causes of action, in this case.

It is not optional with the court to give or deny the right of trial by jury, because the act provides that the trial by jury must be granted *when either party requires it.*

The issues to be tried in the original case and the 373 additional claims brought into the case by the amendment are as follows:

First. Have the defendants been guilty of negligence in causing the damages complained of?

Second. If that issue is found against the respondents, what is the amount of the damages sustained?

Either party has a right to require a jury to pass upon these issues—both of them. If so, then there must be 374 jury trials of issues in this case and not one trial on 374 claims.

Whatever decisions may be found, or whatever text-writers may have said, there is no precedent in the books or anywhere for joining separate and distinct causes of action with a pending suit, where a jury trial can be demanded to try "all facts put in issue in such suits," as in this case.

If this issue of fact, viz: the determining of the fault of the Steamer Eastland, or others, were to be decided first in each and all of the cases—and this issue must be determined by the District Judge without a jury, then there might be some reason for combining all of the cases for that purpose, but that is not the case here. Each of these libelants, as well

as each of the respondents, has the right to demand a jury trial of the issues in each separate case, and the court must grant it if requested, which might result in as many trials as there are claims.

A separate trial of the issues on each of the claims would be in effect the same as a trial of a separate suit for each claim.

How can the court grant separate hearings in this case when all of the parties are libelants together in one action or suit against all of the defendants, requiring but one trial? How can a jury try this case unless the evidence in each case be introduced separately so it can fix the liability and find the amount of damages in each case, on each claim, depending, as that case must, upon the peculiar facts and circumstances of that case alone?

As amended, the libelants are all joint libelants, on the one side 374 as one party, and on the other side the defendant as the other party.

It is submitted that the ruling of Judge Landis in allowing 373 claimants to join in the original libel operates to deprive the defendants of their proper right to a jury trial. This is a statutory right granted them by the United States statute and means that they have a right to a jury trial at common law. To have this they must have the right to have a separate jury for each separate cause of action, which necessarily means that these must be tried and kept as distinct rights. As soon as they are lumped in one libel, it means that they must be tried and a judgment must be rendered in one suit, and this cannot be done without destroying the defendant's right to a separate jury trial.

We submit that the order of the District Judge, which combined all these suits, operates to deprive the defendant of his right to a jury trial and that the Judge of the District Court is without jurisdiction to make an order of this character and that a writ of prohibition is a proper remedy to prevent it.

In conclusion, therefore, the defendant's position is:

First. Prohibition is a proper remedy in admiralty cases under the United States Statutes, whenever there is a lack of jurisdiction by the court below, either over the subject matter or the person.

Second. A court is always without jurisdiction when it proceeds in an action *in personam* without service of process and this was done by the court below when it took jurisdiction of 373 new claims by joining them to one original libel, and ordered the defendant to plead without requiring any service.

Third. The fundamental principle of jurisprudence, that there is no jurisdiction without service in suits *in personam*, applies equally in admiralty, in equity and at common law, and in this case the Court of Admiralty is clearly without jurisdiction over the petitioner.

Fourth. Under the United States Statute the defendant is entitled, in this case, to a separate jury trial for each claim, and to order a joinder putting 374 cases in one, operates to deprive the defendant of its right to a jury trial, and the court below was without jurisdiction to enter an order which thus deprived the defendant of its statutory right.

The court exceeded its jurisdiction, as well for denying a jury trial by this joinder as by lack of service of process, as indicated above.

The petitioner here therefore insists upon its constitutional right of service of process upon it before it ought to be compelled to go to trial. For this and the other foregoing reasons the petitioner prays that the writ of prohibition may issue as prayed for in the petition.

Respectfully submitted.

CHARLES E. KREMER,
RUSSELL MOTT,
Proctors.

Chicago, October, 1916.

NO. 25

IN THE

SUPREME COURT OF THE UNITED STATES

In the matter of the Petition of THE INDIANA TRANSPORTATION COMPANY for a Writ of Prohibition. } Original

REPLY BRIEF.

CHARLES E. KREMER,
RUSSELL MOTT,
Proctors.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

In the matter of the Petition of THE INDIANA TRANSPORTATION COMPANY for a Writ of Prohibition.	Original

REPLY BRIEF.

BRIEF.

I.

The defendant objected to the action of the court by filing its first set of exceptions and, when these were overruled, no further action by the defendant could operate as a waiver of its objections.

Harkness v. *Hyde*, 98 U. S. 476.

Merchants H. & L. Co. v. *Clow & Sons*, 204 U. S. 286.

Atlantic States Railroad Co., 164 U. S. 633.

Davis v. *C. C. C. & St. L. Railroad Co.*, 217 U. S. 157.

Mex. Cen. R. R. Co. v. *Pickney*, 149 U. S. 194.

Coal Co. v. *Blatchford*, 78 U. S. 172.
First National Bank v. *Cunningham*, 48 Fed. 510.
Graham v. *Spencer*, 14 Fed. 603.
Donahue v. *Calumet Fire Clay Company*, 94 Fed. 23.
Romaine v. *Union Insurance Co.*, 28 Fed. 625.
Waters v. *Central Trust Co.*, 126 Fed. 468.
Yanuszauchas v. *Mallory S. S. Co.*, 232 Fed. 133.
Morris v. *Graham*, 51 Fed., page 53.
Lung Chung v. *Northern Pac. Ry. Co.*, 19 Fed. 254.
Baungardner v. *Bono Fertilizer Co.*, 58 Fed. 1.
Ins. Co. of No. Am. v. *Svenden*, 74 Fed. 346.
Stonega Co. v. *Louisville, etc., Co.*, 139 Fed. 271.
Foster-Mulburn Co. v. *Chinn*, 202 Fed. 175.

II.

Wherever an admiralty court has allowed an amendment by adding a new cause of action over which it had no jurisdiction it has required a new and additional service before calling upon the defendant to answer.

The Monte, 12 Fed. 331.
Moore v. *Kimball*, 66 Fed. 340.
The Lowlands, 147 Fed. 986.
The Nora, 181 Fed. 845.

ARGUMENT.

The main question in this case, that is, whether or not the court below had jurisdiction of the defendant without service of process, has, we believe, been fully covered by the cases cited in the original brief and it is unnecessary to add further citations. The respondents have cited nothing in their brief to show that the court originally had jurisdiction of the defendant as to the 373 additional libelants.

The only attempt which the respondents have made to support the jurisdiction of the court below is by citing a number of cases in which admiralty has allowed the consolidation of libels.

Rich et al. v. *Lambert et al.*, 53 U. S. 347.
Fretz v. *Bull et al.*, 53 U. S. 468.
The Clan Graham, 153 Fed. 977.
The Samson, 197 Fed. 1017.
The Albert, 40 Fed. Rep. 836.

These cases refer to a consolidation of cases under section 921 of the Revised Statutes. This statute relates entirely to pending cases and does not relate to the consolidation of causes of action. Here we have no pending cases except one, and the court is attempting to consolidate causes of action and not pending cases. The consolidation might properly be proposed if the 373 cases were actually pending in the court. The right to consolidate is statutory and this is its authority. There is no statute authorizing consolidation of causes of action and, there-

fore, there is no authority for joining 373 additional causes of action with a pending one, and these cases therefore are not in point.

In all these cases, without exception, all the parties were properly before the court and it was merely a question of the merits of consolidation and joinder of cases in admiralty. As petitioner pointed out in great length in its original brief these cases have absolutely no bearing upon the question involved, which is a question, not of practice, but of jurisdiction. No further answer is needed to these cases which comprise the bulk of the brief of the respondents, except to say that this is a question of jurisdiction, and not of practice, and that cases which cover only the question of practice in admiralty, where the court had full jurisdiction, have no bearing on the question involved in this case.

In fact the respondents have practically admitted that the court had no jurisdiction because in a large portion of their brief they claim that the objection to the jurisdiction has been waived by the petitioner by filing its exceptions. By its very nature this position admits that the court had no jurisdiction originally but urges that the petitioner later subjected itself to the jurisdiction of the court. This case is peculiar in this: that the petitioner never entered any appearance to the amended libel. It was already served and before the court in the suit by the administrator of the estate of Earl H. Dawson and its first exceptions objected to the amendment, as follows:

> 1st. "That the said amended libel is informal, contrary to the admiralty rules and procedure and contrary to law because it joins with

the original libelant 373 additional libelants who have a separate and distinct cause of action from that of the original libelant, and are, therefore, improperly joined.

2nd. Because the above named respondent cannot in law in this case be called upon to answer the said amended libel as to 373 additional libelants."

It cannot possibly be said that this is a waiver of the objections. In numerous cases, both in this court and in the Circuit Courts it has been held that it is sufficient if the defendant calls the attention of the court to the objection which shows the illegality of the action of the court, and its lack of jurisdiction. No special form or words is necessary, and no special appearance but, as a matter of fact, there never was any appearance whatever for the defendant as against the three hundred seventy-three new parties. The defendant was already in court defending against the administrator of the estate of Earl H. Dawson and it simply objected to the court's order joining 373 new parties, which was a sufficient objection as to jurisdiction.

The respondents also claim that the defendant, on the 18th day of September, filed a second set of exceptions, which waived the jurisdictional point, and operated as a general appearance. This second set of exceptions was filed by the defendant after the judge had overruled its first objection to the jurisdiction of the court, and again ordered the defendant to answer. It interposed the second set of exceptions to protect it from default and in this second set it again objected to the jurisdiction of the court.

This cannot be construed to be a waiver of the objection. In fact, if the objection of the legality of the proceeding of the court had once been raised by the defendant, it could have pleaded to the merits and gone to trial without waiving the jurisdictional point. This has been settled by a vast number of cases both in this court and in the lower federal courts. The leading case is the case of *Harkness* v. *Hyde*, 98 U. S. 476. This case has been followed in a large number of other cases, many of which we have cited in this reply brief.

The case of *Harkness* v. *Hyde* was a case of illegal service, and raised the question of personal jurisdiction. The defendant first objected to the service and, on that being overruled, pleaded to the merits of the action and it was claimed that this operated as a waiver of the jurisdictional point. Mr. Justice Field stated the law on this point in the following words:

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is hereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is

> only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

So, too, in the case of *Southern Pacific Company* v. *Denton*, 146 U. S. 202, Justice Gray said, on page 206:

> "But in the present case there was no such waiver. The want of jurisdiction, being apparent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. *Coal Co.* v. *Blatchford*, 11 Wall. 172. The defendant did file a demurrer for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed. Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the objection."

The decision in *Harkness* v. *Hyde* has been approved and followed again and again by this court. For example:

> *Merchants H. & L. Co.* v. *Clow & Sons*, 204 U. S. 286.
>
> *Atlantic States Railroad Co.*, 164 U. S. 633.
>
> *Davis* v. *C. C. C. & St. L. Railroad Co.*, 217 U. S. 157.
>
> *Mex. Central Railroad* v. *Pickney*, 149 U. S. 194.

In the case of *Coal Company* v. *Blatchford*, 78 U. S. 172, Justice Field held that the proper way to point out the lack of jurisdiction was by demurrer, which is practically the same as the exceptions in

this case. We submit to the court that this is a question more of substance than of form and if the defendant objects to the action of the court it is sufficient. This has never been expressed better than by Justice Field when he said:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such peculiarity."

In the case of *First National Bank* v. *Cunningham,* 48 Fed. 510, at page 517, the court said:

> "A party appeared by counsel to make objections to the sufficiency of the proceedings, and which objections were overruled. This action was claimed in subsequent proceedings to be a waiver of such objection, but the court, by Bronson, C. J., said: 'It would be strange indeed, if that could be construed into a waiver of the very objection which he took.' "

In the case of *Graham* v. *Spencer,* 14 Fed. 603, at page 607, the court said:

> "In several of the cases above cited there is nothing in the report to show that the appearance was special. The fact of the withdrawal after the plea or motion was overruled, seems to have been deemed enough. Two cases in the Supreme Court taken together, will show that a mere appearance, without pleading to the merits is not necessarily a submission."

In the case of *Donahue* v. *Calumet Fire-Clay Company,* 94 Fed., page 23, at page 27, the court quoted from the case of *Harkness* v. *Hyde,* and said further:

> "The basis of the doctrine is that the defendant does not appear voluntarily, but under a de-

gree of compulsion, when having made, as strenuously as possible in the first instance, objection to the service of the process, he yields to answer to the merits. Particularly must this be so when, as in this case, he repeatedly reiterates, emphasizes, and insists upon his protests against the jurisdiction and the manner of bringing him into court."

Perhaps the best discussion of the principle applied in the Federal Courts appears in the decision of Judge Harmon in the case of *Romaine* v. *Union Insurance Company,* 28 Fed. 625. On pages 637 and 638 the following appears:

"Both in law and equity cases this matter of a formal and preliminary *appearance* is everywhere disused, notwithstanding the rigid and technical enforcement of the rule that a general appearance operates as a waiver of the objection we are considering, and that it must be taken by a special appearance for that purpose. But the fact is that appearances are rarely formally entered *as such,* notwithstanding our equity rule 17; the solicitor simply entering his name on the docket, and appearing by whatever step he may take in pleading. This, of course, is a general appearance, and waives every mere irregularity, but never any jurisdictional question; the cases showing that the federal courts, and especially the Supreme Court, are the most exacting of all in regard to these two rules. If a special appearance is desired, it seems to be accomplished by some mere statement of counsel that he so appears, or it is left to a mere implication from the steps he takes; and wherever the fact appears that he so limits his appearance, no *matter how,* no courts are more liberal than the federal courts, and all are so, in giving effect to that intention, without regard to any technical requirement of the practice in that behalf. *Harkness* v. *Hyde,*

98 U. S. 476. I shall merely cite the cases I have classified under the general head of 'Appearance' to establish these views; but it is shown by all the cases more by an exhibition of their disregard of technical forms than by any decisions or discussions on the subject. The general result is that the party must manifest an intention to appear specially, or he will be rigidly held to have appeared generally; particularly by taking any step that can be taken only by such an appearance; but the courts have never been exacting to require the manifestation of the intention to appear specially in any particular way whatever."

This doctrine that the courts of the United States will look to the substance, and not to any particular form, has been repeatedly affirmed. For example, in the case of *Waters* v. *Central Trust Company,* 126 Fed. 468, at the bottom of page 471, the court said:

"Evidently the sole purpose of counsel for defendant in making said application for extension of time after the state court had thus refused to pass upon the application was to preserve the rights of his client to a removal of the cause, when the state court should act upon said petition. It is immaterial to the decision of the question herein whether such action was or was not necessary. There was no waiver, for 'waiver is the intentional relinquishment of a known right.' *Shaw* v. *Spencer et al.,* 100 Mass. 382, 395; 97 Am. Dec. 107; 1 Am. Rep. 115; *Hoxie* v. *The Home Insurance Company,* 32 Conn. 31, 40, 85 Am. Dec. 240. Here was no relinquishment, intentional, or otherwise, but a manifest intention to deny the right of the state court to proceed in the cause, and to assert the rights of defendant to be heard in another jurisdiction.

"We are not aware of any principle upon which a party, being unable to presently assert

> his jurisdictional rights because of the refusal of a court to consider his claim, can be said to voluntarily abandon said rights, because he may consider himself obliged, by reason of the action of the court, to assent to a postponement of the time when such jurisdictional rights may be asserted."

If the defendant in this case had not pleaded its second set of exceptions it would have been defaulted and this can never be required of a defendant. As was said by the court in the case of *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. at page 133:

> "To assert that the defendant was compelled to accept a situation which might result in a default being taken against him while the court was considering its rights, is both illogical and unfair."

The respondent has cited a number of cases where defects in the forms of the service have been waived. We need hardly call the attention of the court to the fact that these cases are not cases of jurisdiction and whatever may be the law as to them they have absolutely no application to the present case. The distinction is well pointed out in the case of *Morris* v. *Graham*, 51 Fed. at page 54:

> "While the defendant may very properly be estopped from denying the jurisdiction of the court which he has voluntarily selected, on account of technical grounds, or irregularity, or insufficiency of service, which has been practically cured by his appearance, the court is not estopped from inquiring into its jurisdiction based upon service, facts of parties, values, or any other matters which are material. There is an important distinction between mere irregularities and such defects as render a ser-

> vice a nullity. Although an irregularity may be waived, and illegality of service, or an essential defect, may be taken advantage of at any subsequent stage of the action, whether the appearance has been special or general. 'An appearance does not preclude a party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for want of notice, in the record.' "

The same question was taken up and discussed by the court in the case of *Lung Chung* v. *Northern Pac. Ry. Co.*, 19 Fed. 254.

The respondents have several times argued in their libel as if this were a question of defective service, or as if some sort of service could have been had, or had been had, upon the defendant, but the record shows that the court, when it allowed the amendment by adding 373 new cases, at once ordered the defendant to plead to the amended libel. This excluded any possibility of service, and it was necessary for the defendant to take some action at once, or be defaulted.

The defendant was already before the court in the case of Earl H. Dawson deceased and it took the only method it could take. It entered no new appearance but at once excepted to the allowance of further parties to be joined as parties libelant. No appearance was ever entered by the defendant in any way to the three hundred seventy-three new suits. It simply objected to the allowance of the amended libel, as it had to do, in order to protect itself from a general default being entered against it. The judge then, at once, without argument, overruled the defendant's exceptions, and forced it

to again default or plead. Defendant thereupon excepted again raising the jurisdictional point.

There is nothing in this record that in any way shows the defendant ever waived its objections to the course taken by the judge below. In fact, the entire record shows the defendant in every way has urged its rights again and again upon the court below, without success, and the defendant could not have waived its objection to the question of jurisdiction.

The cases we have cited in this brief we believe cover the point in this case. It was sufficient if the defendant raised the objection of the legality of the proceeding in any form, so the objection was brought to the attention of the court, and when this had once been done, under the rules stated in *Harkness* v. *Hyde* and followed in a vast number of other cases, no action by the court could overrule the defendant's objection and no further answer by the defendant could operate as a waiver. The only requirement is that the defendant will call the attention of the court to the jurisdictional defect at once, and not attempt to play fast and loose with the court by first going to trial on the merits, and then objecting that the court did not have jurisdiction.

There is no possible showing in this case that the defendant ever entered any general appearance or intended to, or in any way waived its objections to the action of the judge below in allowing 373 new cases to be added to the original suit and ruling on the defendant to answer, nor is there anything that can show that the court ever had jurisdiction.

The respondents, in their brief, have also cited three cases merely stating that they prove that this court should not have issued this writ of prohibition. Two of these cases are:

Ex parte Gordon, 104 U. S. 515.

In re The Louisville Underwriters, 134 U. S. 488.

In these cases the Supreme Court of the United States denied the writ of prohibition after going carefully into the matter and deciding that the court below had jurisdiction. This is the very question to be decided in this case and the cases cited are clearly in favor of petitioner as they both decided that whether a writ of prohibition should issue or not depends upon whether the court has jurisdiction.

The third case cited by the respondents is the case of *In re New York, etc., S. S. Co.*, 155 U. S. 523, which is to the same effect. The court there said on page 531:

> "We have recently thus stated the principles applicable to the issue of the writ of prohibition in *In re Rice, ante*, 376: 'Where it appears that the court, whose action is sought to be prohibited has clearly no jurisdiction of the case originally or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right.'"

Respondents have also suggested that one reason why the writ of prohibition should be refused in this case is that the question might be raised by appeal. To require a petitioner to try to cover this by appeal

would be an absurdity. Petitioners would have to go to the expense of a trial of 374 separate suits and then on final judgment file a surety bond for several million dollars in order to raise the necessary preliminary question which is now before this court.

We submit that the right to a writ of prohibition exists in a case in which a court has attempted to take jurisdiction without legal right. The purpose and object is that illegal action may be stopped before the litigants are subjected to the hardship and expense of idle litigation, or forced to protect their rights by an appeal, which is in this case a practical impossibility.

We further submit that it is for the interest of the respondent that it should not indulge in litigation before a court which has no jurisdiction, and that the interest of both parties will be benefited by having this question settled by a writ of prohibition before the litigation proceeds further.

There has never been a case before exactly like the present one. The very fact that the procedure is unheard of tends to show that it is not within the accepted jurisdiction of the court. We have, however, found a line of cases which are somewhat similar to the present case. In each of these cases there was a libel *in rem* in admiralty, and thereafter a libel *in personam* was joined and, in every case, additional service was required.

The Monte, 12 Fed. 331.
Moore v. *Kimball*, 66 Fed. 340.
The Lowlands, 147 Fed. 986.
The Nora, 181 Fed. 845.

As was stated in the case of *Moore* v. *Kimball*, 66 Fed. Rept. 342:

> "The court also erred in rendering a personal decree against Moore. There is in the libel no prayer for a monition and personal judgment against him. There was no service of monition on him, no attachment made of his property for the purpose of bringing him into court, and no voluntary appearance to answer to the proceedings *in personam*. The fact that he appeared by his attorneys to answer to the libel *in rem*, and to defend the *res* seized, did not give the court jurisdiction to render a personal judgment against him."

We believe the language of the court here quoted applies to the present case exactly. The appearance of the defendant in the case of Earl H. Dawson, had no bearing whatever on the 373 new suits, and to give the court jurisdiction over them, it would be necessary to have a new service bringing the defendant before the court. To rule otherwise it would necessarily follow that a person before the court for any one purpose would be before the court for all purposes and it would entirely overturn every accepted rule of jurisdiction. (See *Pennoyer* v. *Neff* and other cases cited by petitioners in original brief.)

It would at once bring out the result deprecated in *The Monte* case, cited above, and cited in *The Lowlands*, 147 Fed., at page 988:

> "It would be unjust to hold that a foreign owner shall not appear in a foreign court to reclaim his property as against an unauthorized seizure without necessarily subjecting himself to liability for a personal judgment against which he has never been cited to defend."

In other words, a non-resident defendant could not go into court to prevent a default judgment on one personal action against him without subjecting himself to as many other additional personal actions as choose to intervene in the original action.

As to the point made by the petitioners that they are being deprived of their right to a jury trial in the admiralty suit on the question raised by this joinder of 373 new cases the respondents have cited nothing except two cases, on pages 22 and 23 of their brief, where two jury trials were consolidated. This might possibly be within the rights of the court but the allowance of the consolidation of 374 cases operates immediately to deprive the defendants of all their rights to a jury trial. This is a practical question and we submit the judge exceeded his jurisdiction in entering an order which thus deprived the defendants of their substantial rights.

We submit to the court that a writ of prohibition should issue in this case because:

First. Under the statute the Supreme Court should issue a writ of prohibition in any case where a court of admiralty is proceeding without jurisdiction or by exceeding its jurisdiction.

Second. The court below is without jurisdiction in this case because it did not obtain jurisdiction over the 373 new cases. The court had no method of obtaining jurisdiction except by proper service and there was no service in this case because the defendants were ruled on to answer at the very time the amendment was allowed. This is contrary to all principles of jurisdiction as laid down in the

case of *Pennoyer* v. *Neff* and other cases cited in our original brief.

Third. The defendant never waived the jurisdictional objection, nor submitted itself to the jurisdiction of the court because it raised the question of the illegality of the action of the court immediately, by its exceptions, which was all it was required to do under the rule of *Harkness* v. *Hyde*, and other cases cited in this brief, and when it had once objected to the illegality of the action of the court, and its objections had been overruled by the judge, no further pleading by the defendant operated to waive its objections.

For the reasons above cited we submit to the court that a writ of prohibition should issue in this case.

Respectfully submitted,

CHARLES E. KREMER,
RUSSELL MOTT,
Proctors for Petitioner.

Chicago, May, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 25, Original.

EX PARTE: IN THE MATTER OF THE INDIANA TRANSPORTATION COMPANY, PETITIONER.

RETURN OF RESPONDENT TO RULE TO SHOW CAUSE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 25, Original.

IN THE MATTER OF PETITION OF INDIANA TRANSPORTATION COMPANY FOR WRIT OF PROHIBITION.

For return to the rule heretofore entered in said cause the undersigned submits to the court the attached certified copies of certain documents and orders.

KENESAW M. LANDIS.

LIBEL AND INTERROGATORIES.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION. IN ADMIRALTY.

To the Honorable Judges of the District Court of the United States in and for said Division:

The libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, against The St. Joseph-Chicago

Steamship Company, a corporation; The Indiana Transportation Company, a corporation, and The Dunham Towing and Wrecking Company, a corporation, in a cause of damage, civil and maritime, alleges as follows:

First. That the libelant is administrator of the estate of Earl H. Dawson, deceased, duly appointed and qualified to act as such.

Second. That on July 24, A. D. 1915, The St. Joseph-Chicago Steamship Company, a corporation, was the owner of the steamer known as the *Eastland*, and had chartered said steamer to said Indiana Transportation Company, for the purpose of carrying passengers thereon to Michigan City, Indiana, from a point on the Chicago River near and just west of the Clark street bridge which crosses said river, in the city of Chicago, County of Cook, and State of Illinois, district and division aforesaid, and said Dunham Towing and Wrecking Company, a corporation, was the owner of a tugboat known as the *Kenosha*, which was attached to said steamer *Eastland* by ropes and cables at the point aforesaid on said Chicago River, and said steamer and tug were then and there being used by said libelees in the business of commerce and navigation upon Lake Michigan and its tributary waters, including said Chicago River.

Third. Libelant, upon information and belief, alleges that on said 24th day of July, A. D. 1915, said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company accepted as a passenger on said steamer said Earl H. Dawson, at the point aforesaid on said Chicago River, for the purpose of conveying said Earl H. Dawson as such passenger to Michigan City, Indiana, on said steamer, and while attempting so to do then and there so carelessly, negligently, wilfully, wantonly, wrongfully and improperly so managed, operated, and controlled said steamer that it then and there tipped over on its side in said Chicago River, and by reason thereof said Earl H. Dawson was then and there killed.

Fourth. Libelant also alleges on information and belief that at the time and place of the tipping over of said steamer as aforesaid said Dunham Towing and Wrecking Company so carelessly, negligently, wilfully, wantonly, wrongfully and improperly managed, operated and controlled its said tugboat while so attached to said steamer as aforesaid that thereby, in connection with said wrongful, negligent and improper conduct of said other libelees, said steamer was then and there caused to tip over as aforesaid.

Fifth. Libelant, not being advised of all that took place and of all conditions existing on and in connection with said steamer and tug at and before the time of the tipping over of the same as aforesaid, and therefore reserving the right to claim the benefit of any faults causing such tipping over which may result on a full hearing herein, on information and belief alleges that said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company, in addition to their negligent and wrongful conduct above set forth, were guilty of the following specific faults, which caused said steamer so to tip over:

1. Said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company were negligent in using a steamer which was and which they knew, or by the exercise of proper care would have known, to be unsafe and unseaworthy.

2. That they were negligent in permitting a large number of passengers to board said steamer without attending to their duty to see that proper precautions were taken to protect said passengers from harm and injury.

3. That they were negligent in allowing a larger number of passengers to board said steamer than could safely and properly be carried thereon.

4. That they were negligent in not providing proper and competent servants to manage, control and operate said steamer.

5. That they were negligent in not providing sufficient

employees to properly manage, control and operate said steamer.

6. That they were negligent in not providing proper ballast tanks and other apparatus and appliances to prevent said steamer tipping over.

7. That they were negligent in improperly operating, controlling and managing the ballast tanks, apparatus and appliances which were provided on said steamer.

8. That they were negligent in allowing a large number of passengers to board said steamer, and in moving and attempting to move said steamer with the ballast tanks thereon partially or wholly unfilled with water.

9. That they were negligent in disconnecting the ropes and cables by which said steamer was attached to its dock.

10. That they were negligent in moving and in attempting to move said steamer when it was, and when they knew or by the exercise of proper care would have known that it was, in an unsafe and improper condition to be moved.

11. That they were negligent in moving and in attempting to move said steamer in an unsafe and improper manner.

12. That they were negligent in allowing and in ordering said tugboat *Kenosha* to move and tow, and to attempt to move and tow, said steamer when said steamer was, and when they knew or by the exercise of proper care would have known that said steamer was, in an unsafe and improper condition to be moved and towed.

13. That they were negligent in ordering and in allowing said tugboat *Kenosha* to move and tow and to attempt to move and tow said steamer under unsafe and improper conditions and in an unsafe and improper manner.

14. That they were negligent in not warning and ordering the passengers on said steamer to leave and disembark therefrom when they, said companies, knew, or by the exercise of proper care would have known, that it was unsafe and dangerous for such passengers to remain thereon.

15. That they were negligent in allowing passengers to

board said steamer when they, said companies, knew, or by the exercise of proper care would have known, that it was dangerous and unsafe for such passengers to board same.

16. That they were negligent in permitting a large number of passengers to board said steamer without previously having had said steamer properly inspected and tested to determine whether such steamer was properly constructed and equipped and in proper condition to safely allow such large number of passengers to be thereon.

17. That they were negligent in permitting a large number of passengers to board said steamer when said steamer was not and when they, said companies, knew, or by the exercise of proper care would have known, that said steamer was not properly constructed and equipped and in proper condition to safely allow such large number of passengers to be thereon.

18. That they negligently permitted a large number of passengers to board said steamer without having proper inspections and tests made to determine whether it was sufficiently stable and in proper condition to safely allow such number of passengers to be thereon, and permitted such large number of passengers to board same when it was not, and when they, said companies, knew, or by the exercise of proper care would have known, that it was not, sufficiently stable and in proper condition for such purpose.

19. That they negligently failed to provide sufficient and proper life-saving apparatus and equipment on board said steamer for the number of passengers permitted by them to board, and who did board, the same, and negligently failed to have properly accessible for such passengers such life-saving apparatus and equipment as were provided thereon.

20. That they negligently failed to use proper care to protect from harm and injury the passengers permitted by them to board said steamer when they, said companies, knew, or by the exercise of proper care would have known,

that the condition of said steamer was such that it was in danger of tipping over.

21. That they negligently permitted said steamer to be overloaded with a great amount of freight and supplies and other paraphernalia in addition to the large number of passengers permitted by them to be thereon without taking proper precautions and exercising proper care to make said steamer stable and safe under such conditions for said passengers.

22. That they were warned of the danger of said steamer tipping over a sufficient length of time before it did tip over to have enabled them by the exercise of proper care to cause all or a portion of said passengers to safely disembark from said steamer before it tipped over and prevent it from tipping over, yet they carelessly, negligently, and wilfully and wantonly failed to heed such warnings and to exercise such care.

Sixth. And said Dunham Towing and Wrecking Company, in addition to its negligent and wrongful conduct above set forth, was guilty of the following specific faults which caused said steamer to tip over as aforesaid:

1. It negligently attempted to move and tow, and did move and tow, said steamer when it was not and when it, said company, knew, or by the exercise of proper care would have known, that said steamer was not in a safe and proper condition to be moved and towed.

2. It negligently attempted to move and tow, and did move and tow, said steamer in an improper and unsafe manner.

3. It negligently managed, operated, and controlled its said tug boat *Kenosha* while same was attached to said steamer.

Seventh. And libelant on information and belief further alleges that said Earl H. Dawson, deceased, left him surviv-

ing next of kin as follows: William Dawson, his father; Edward Nathaniel Dawson, his brother, and Lillian Edna Dawson, his sister, who are still living; and by reason of the death of said Earl H. Dawson, deceased, as aforesaid, his said next of kin have been and are deprived of their means of support and have been pecuniarily injured as a direct result of the death of said deceased.

Wherefore your libelant prays that process in due form of law, according to the course and practice of this honorable court, may issue against said St. Joseph-Chicago Steamship Company, a corporation; said Indiana Transportation Company, a corporation, and said Dunham Towing and Wrecking Company, a corporation, and that said St. Joseph-Chicago Steamship Company, a corporation; said Indiana Transportation Company, a corporation, and said Dunham Towing and Wrecking Company, a corporation, may be cited to appear and answer all and singular, the allegations of this libel, and that upon final hearing this honorable court may find in favor of libelant's claim herein and decree payment thereof with interest and costs, and that this honorable court may grant such other and further relief as libelant may be entitled to receive in the premises.

JAMES F. BISHOP,
As Administrator of the Estate of
Earl H. Dawson, Deceased, Libelant.

HARRY W. STANDIDGE,
Proctor for Libelant.

STATE OF ILLINOIS,
County of Cook, ss:

James F. Bishop, being duly sworn, says that he is administrator of the estate of Earl H. Dawson, deceased, libelant herein; that he has read the above and foregoing libel

and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be alleged on information and belief, and as to such matters affiant believes it to be true.

JAMES F. BISHOP.

Subscribed and sworn to before me this 20th day of August, A. D. 1915.

[SEAL.] IRA W. HURLEY,
Notary Public.

Interrogatories to be Propounded by the Above-named Libelant to, and to be Answered by, St. Joseph-Chicago Steamship Company.

1 Q. Were you, on July 24, A. D. 1915, the owner of the steamer known as the *Eastland?*

2 Q. Was said steamer, on said July 24, A. D. 1915, chartered by you to the Indiana Transportation Company to carry passengers from a point on the Chicago River near to and just west of the Clark Street bridge in Chicago, Illinois, to Michigan City, Indiana?

3 Q. Did you, on said July 24, A. D. 1915, deliver said steamer to the starting point of the voyage mentioned in interrogatory 2, and was said steamer at said time and place wholly manned by your crew? If not, state whose crew it was manned by.

4 Q. State the number of which the crew mentioned in interrogatory 3 consisted, and the names and prescribed duties of the principal members of such crew, and particularly those whose duties directly affected the safety of the passengers on said steamer. Also state the length of the period of service of each of said principal members as a member of said crew.

5 Q. State the names and duties of the members of the

crew mentioned in interrogatories 3 and 4, who had charge of the ballast tanks on said steamer, and any other members of said crew whose duties affected the matter of the stability of said steamer, and state the length of the period of service of each as a member of said crew.

6 Q. State what parts of said steamer and what conditions thereof affected its stability and how.

7 Q. State what the condition of said ballast tanks was at the time and just prior to the time said steamer tipped over on July 24, A. D. 1915, with reference to the condition of repair thereof and the amount of water therein.

8 Q. State if you know whether lack of sufficient water in said ballast tanks caused said steamer to tip over.

9 Q. State, so far as you know, all of the causes and conditions which caused said steamer to tip over.

10 Q. State the number of passengers on said steamer at the time it tipped over, and whether in such number children and babes in arms were counted, and, if so, how?

11 Q. State the amount of coal in the bunkers of said steamer and the amount of other supplies and paraphernalia on it at the time it tipped over.

12 Q. State whether the number of passengers on said steamer at the time it tipped over was in any way regulated, governed, or affected by the amount of coal and other supplies and paraphernalia on said steamer at said time.

13 Q. State whether prior to the time of such tipping over of said steamer there was knowledge on the part of any of your officers that previously there had been difficulties in the operation of said steamer with reference to the stability thereof; and, if so, state what such knowledge was.

14 Q. State whether prior to the time of the tipping over of such steamer you or any one on your behalf made any tests with reference to the stability of said steamer, and, if so, state what such tests were and the results thereof.

15 Q. State whether any of your officers have knowledge as to whether any tests with reference to the stability of said

steamer were ever made by any one after the time of the construction of said steamer, and, if so, what such tests were, by whom made, and the results thereof.

16 Q. State when the last United States Government certificate was issued referring to the carrying capacity of said steamer, what carrying capacity was specified therein, and whether anything was provided in said certificate as to the number of passengers specified therein being governed or affected in any way by the amount of supplies and other paraphernalia to be carried with such passengers on said steamer.

17 Q. Set forth copy of certificate referred to in Interrogatory 16.

18 Q. When was the last United States Government certificate issued prior to the certificate mentioned in Interrogatory 16, specifying the carrying capacity of said steamer, and what such carrying capacity was?

19 Q. State what tests, if any, were made with reference to the carrying capacity of said steamer before the issuance of each of the certificates mentioned in Interrogatories 16 and 18, and what the results of such tests, if any, were.

20 Q. If the carrying capacity specified in Interrogatory 16 was greater than that specified in Interrogatory 18, state whether any tests of said steamer were made with reference to the carrying capacity thereof, between the times of the issuance of said certificate mentioned in Interrogatory 18 and said certificate mentioned in Interrogatory 16? If so, state what such tests were and the results thereof.

21 Q. State for what reasons and on what grounds said certificate for increased carrying capacity, if any, mentioned in Interrogatory 16, was granted and issued, who for your company obtained said certificate, from whom it was obtained, what procedure was adopted in obtaining it, and what requirements, if any, you complied with in procuring the same.

22 Q. State how long said steamer started to list before it tipped over on July 24, A. D. 1915.

23 Q. State whether any effort was made by you or members of your crew to warn passengers of danger and have them disembark from said steamer before said steamer tipped over on said 24th day of July, A. D. 1915, and if so, how long before said steamer so tipped over.

24 Q. State what amount of life-saving apparatus and equipment was on said steamer at the time it tipped over, and where the same was stationed on said steamer when passengers began to board the same on said 24th day of July, A. D. 1915.

25 Q. State whether said steamer was attached to its dock in any way at the time it tipped over. If so, in what way? If not, how long before it tipped over it was detached therefrom?

26 Q. State whether said steamer was attached to the tugboat *Kenosha* at the time it tipped over. If so, in what way?

27 Q. State whether said steamer was moved or towed from its dock just before it tipped over, or if an attempt was made so to move or tow it at said time. If so, in what way, and by whom, and what was done in that regard?

28 Q. Were any orders given by you or your crew to any members of the crew on said tugboat *Kenosha*, with reference to the moving or towing of said steamer just before it tipped over? If so, what were such orders, and what did said crew on said tugboat do, and what were the movements of said tugboat in response to such orders?

29 Q. State whether you became possessed of said steamer by purchasing it at a price greatly less than its original cost; whether it was defective at the time you so purchased it; and if so, state what such defective condition was; whether you purchased it at such reduced price because of such defective condition of it, and whether you knew what such defective condition was at the time you so purchased it, or

learned of such defective condition before it tipped over on said 24th day of July, A. D. 1915.

30 Q. Was said steamer ever condemned by any one before it tipped over on said 24th day of July, A. D. 1915? If so, by whom, and what were the reasons for such condemnation?

Interrogatories to be Propounded by the Above-named Libelant to, and to be Answered by, The Indiana Transportation Company.

1 Q. Was the steamer known as the *Eastland* chartered by you from The St. Joseph-Chicago Steamship Company to carry passengers from the dock on the west side of the Clark street bridge in Chicago, Illinois, to Michigan City, Indiana, on July 24, A. D. 1915?

2 Q. Was said steamer on said 24th day of July, A. D. 1915, delivered to said starting point of the voyage mentioned in Interrogatory 1, under your charter agreement, if any, with said St. Joseph-Chicago Steamship Company, and was said steamer at said time and place, and until after it tipped over, wholly manned by a crew of said St. Joseph-Chicago Steamship Company? If not manned by that company's crew, whose crew was it manned by?

3 Q. Answer Interrogatories 4 to 20, both inclusive, 22 to 28, both inclusive, and 30, about propounded to said St. Joseph-Chicago Steamship Company, as if said interrogatories were propounded to you instead of to that company?

4 Q. What, if any, investigation did your company or any of its officers make, and what, if any knowledge did your company or any of its officers have regarding the matters inquired about in the foregoing Interrogatory 3, and the interrogatories therein mentioned propounded to said St. Joseph-Chicago Steamship Company, prior to the time said steamer tipped over on July 24, A. D. 1915?

5 Q. Did you or any of the officers of your company, prior to the time passengers began to board said steamer on July

24, A. D. 1915, make any inquiry or investigation with reference to the carrying capacity of said steamer, including its capacity for carrying passengers and supplies and other paraphernalia thereon? If so, what such inquiries and investigations did you make and what were the results thereof?

6 Q. Did you or any officers of your company, prior to the time passengers began to board said steamer on July 24, A. D. 1915, make any inquiry or investigation as to what quantity of supplies and paraphernalia was on said steamer to be carried with such passengers who were to board the same, or to see that proper life-saving apparatus and equipment was provided in proper condition and in properly accessible places on said steamer for said passengers? If so, what inquiry and investigation did you make in that regard, what were the results thereof, and did you do anything, and if so, what, to see that such life-saving apparatus and equipment was provided?

7 Q. Prior to the time when said steamer tipped over what, if anything, did you do to prevent it from being so overloaded with either passengers or supplies and other paraphernalia thereon, that the lives of such passengers would not be endangered?

8 Q. State all that you did at any time to protect from harm and injury the passengers who were on said steamer when it tipped over.

Interrogatories to be Propounded by the Above-named Libelant to, and to be Answered by, the Dunham Towing and Wrecking Company.

1 Q. Answer Interrogatories 9 and 22 and 25 to 28, both inclusive, above propounded to said St. Joseph-Chicago Steamship Company, as if said interrogatories were propounded to you instead of to that company.

2 Q. How long, if any time, was the tugboat *Kenosha* attached to said steamer before said steamer tipped over on

said 24th day of July, A. D. 1915? Describe how said tugboat was attached to said steamer?

3 Q. While said tugboat was attached to said steamer at said time what orders, if any, were given to, or in the possession of, the crew on said tugboat, and by whom were such orders given?

4 Q. State who hired the use of said tugboat for the purpose of moving and towing said steamer, and all that said tugboat did in connection with the moving and towing of said steamer before it tipped over on said 24th day of July, A. D. 1915?

5 Q. Was said steamer grounded on the bottom of the Chicago River when or before it tipped over on said 24th day of July, A. D. 1915? If so, when, how long, and in what manner was it so grounded, and what, if anything, did such grounding have to do with said steamer tipping over?

6 Q. State the usual method of moving and towing said steamer from its dock; when and under what circumstances the dock ropes or cables are released; when and under what circumstances and to what extent the tugboat first applies power to said steamer; in what direction and in what manner does the tug first attempt to move said steamer, and who gives the orders given in so moving and towing said steamer?

7 Q. What, if any, indications did said steamer give of tipping before it tipped over on said 24th day of July, A. D. 1915? How far from its dock was it? How far had it been moved? What way was it pointed, and how was it positioned otherwise when it so tipped over?

8 Q. How long, if any time, did people jump from said steamer before it tipped over?

JAMES F. BISHOP,
As Administrator of the Estate of
Earl H. Dawson, Deceased, Libelant.

(Endorsed:) Filed Aug. 2, 1915. T. C. MacMillan, Clerk.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

The United States of America to the Marshal of the Northern District of Illinois, Greeting:

Whereas a libel has been filed in the District Court of the United States in and for the Northern District of Illinois, on the 21st day of August, in the year of our Lord one thousand nine hundred and fifteen, by James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, against St. Joseph-Chicago Steamship Company, a corporation; Indiana Transportation Company, a corporation; and Dunham Towing and Wrecking Company, a corporation, for reasons and causes in said libel mentioned, and praying the usual process and citation of the said court in that behalf to be made, and that said respondents may be cited to appear and answer all and singular the matters in said libel articulately propounded, and that this court would be pleased to pronounce for the sum of —— dollars, the damages alleged in said libel, besides interest and costs of suit;

You are therefore commanded to cite the said St. Joseph-Chicago Steamship Company, a corporation; Indiana Transportation Company, a corporation; and Dunham Towing and Wrecking Company, a corporation, to be and appear before the said court, to be holden in and for the Northern District of Illinois, at the United States court-room, in the city of Chicago, in said district, on the first Monday in September next, if that be a day of jurisdiction; if not, then on the first day of jurisdiction thereafter, at 10 o'clock in the forenoon of that day, and then and there to appear and answer the allegations of the libel and interpose their defenses, if any there be.

And what you shall have done in the premises do you then and there make return, together with this writ.

Witness the Honorable Kenesaw M. Landis, Judge of said court, this 27th day of August, in the year of our Lord

one thousand nine hundred and fifteen and of our Independence the 140th year.

[SEAL.] T. C. MacMILLAN, *Clerk*,
By ALVA V. SHOEMAKER,
Deputy Clerk.

[Endorsed:] No. 32236. 12636. United States District Court, Northern District of Illinois, Eastern Division. In Admiralty. Jas. F. Bishop, Adm'r, etc., *vs.* St. Joseph Steamship Co. *et al.* Citation. Returnable first Monday in Sep., A. D. 1915. T. C. MacMillan, Clerk. Sue as poor person per order of court. Filed Sep. 4, 1915. Harry W. Standidge, Proctor for Libelant.

(Endorsed on the Back.)

I have served this writ within my district in the following manner, to wit:

Upon the within named, St. Joseph-Chicago Steamship Company, a corporation, by reading and by copy to W. K. Greenebaum, local manager, at Chicago, Illinois, this 30th day of August, A. D. 1915. Upon the within named, I have served this writ within my district in the following manner, to wit: Upon the within named, St. Joseph-Chicago Steamship Company, a corporation, by reading and by copy to Martin Flatow, excursion agent at Chicago, Illinois.

Upon the within named, Dunham Towing & Wrecking Company, a corporation, by reading and by copy to Capt. Robert Young, local manager, both at Chicago, Illinois, this 8th day of August, A. D. 1915.

Upon the within named, Indiana Transportation Company, a corporation, by reading and by copy to W. K. Greenebaum, manager, at Chicago, Illinois, this 30th day of August, A. D. 1915, I was unable to find the president or any other officer of the above corporation within my district.

JOHN J. BRADLEY, *U. S. Marshal*,
By THOMAS HENNEBURY, *Deputy.*

Marshal's fees: 3 services, $6.00.

Exceptions.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 32,236.

JAMES F. BISHOP, *Administrator of the Estate of Earl H. Dawson, Deceased,*

vs.

ST. JOSEPH-CHICAGO STEAMSHIP COMPANY ET AL.

And now comes the Indiana Transportation Company, one of the defendants in the above-entitled cause, and files its exceptions to the libel in said cause.

1st. That the said libel is based upon a right of action which does not exist under the maritime laws of the United States, and that therefore this court has no jurisdiction of the cause of action stated in the libel.

2d. That the said libel does not state any damages suffered by the libelant or those whom he represents.

BOYLE & MOTT AND
C. E. KREMER,
Proctors for Defendant.

(Endorsed:) Filed Oct. 2, 1915. T. C. MacMillan, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MONDAY, July 24, 1916.

Present: Hon. Kenesaw M. Landis, District Judge.

32,236.

JAMES F. BISHOP, *Administrator, etc.,*
vs.
ST. JOSEPH-CHICAGO STEAMSHIP COMPANY ET AL.

Upon motion, leave is hereby granted certain parties to intervene as libelants herein, and to all said libelants to file an amended libel instanter making the city of Chicago, Chicago Railways Company, M. H. McGovern, M. H. McGovern Co., Great Lakes Dredge and Dock Company, and Cohen Company, Fred W. Peck, Sanitary District of Chicago and Western Electric Company additional respondents.

It is further ordered that all respondents served except to or answer said amended libel on or before September 2. The clerk is hereby directed to issue citation, returnable the first Monday in September, to respondents not served.

Exceptions.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 32,236.

JAMES F. BISHOP, *Administrator of the Estate of Earl H. Dawson, Deceased, et al.*

vs.

ST. JOSEPH-CHICAGO STEAMSHIP COMPANY, *a Corporation, et al.*

And now comes the Indiana Transportation Company, one of the respondents above named, and excepts to the amended libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, in the following particulars:

1st. That the said amended libel is informal, contrary to the admiralty rules and procedure, and contrary to law, because it joins with the original libelant 373 additional libelants who have a separate and distinct cause of action from that of the original libelant, and are therefore improperly joined.

2d. Because the above-named respondent cannot in law, in this case, be called upon to answer the said amended libel as to 373 additional libelants.

3d. In all of which particulars the said amended libel is imperfect and insufficient, and that the said respondent is not bound to answer the same as to the 373 additional libelants improperly joined to the original libel.

INDIANA TRANSPORTATION COMPANY,
By C. E. KREMER, *Its Proctor.*

C. E. KREMER,
Proctor for Indiana Transportation Co.

(Endorsed:) Filed Sep. 2, 1916. T. C. MacMillan, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

32,236.

MONDAY, September 18, 1916.

Present: Honorable Kenesaw M. Landis, District Judge.

JAMES F. BISHOP, *Administrator, etc.,*

vs.

ST. JOSEPH-CHICAGO STEAMSHIP COMPANY ET AL.

Upon motion of the libelant, it is ordered by the court that the exceptions of the St. Joseph-Chicago Steamship Company and Indiana Transportation Company to joinder be and the same are hereby overruled, and said respondents are ruled to answer in twenty days from this date.

Exceptions to Libel.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 32,236.

JAMES F. BISHOP, *Administrator of the Estate of Earl H. Dawson, Deceased, et al.,*

vs.

ST. JOSEPH-CHICAGO STEAMSHIP COMPANY, *a Corporation, et al.*

And now comes the Indiana Transportation Company, one of the respondents above named, and excepts to the amended libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, and others as follows:

This respondent does not hereby waive its exceptions heretofore filed in relation to the misjoinder of 373 additional libels and its right, and insists that this court has not jurisdiction of the respondent of so much of the said amended libel as sets up the claims of the 373 additional libelants joined with the original libel, and it therefore insists upon its right to further object to the joining of said 373 additional libelants, and further because said amended libel does not state facts and circumstances which make out a cause of action against this respondent, in all of which particulars the said amended libel is imperfect and insufficient, and that the said respondent is not bound to answer the same.

INDIANA TRANSPORTATION COMPANY,
By C. E. KREMER, *Its Proctor.*

C. E. KREMER,
Proctor for Indiana Transportation Company.

(Endorsed:) Filed Oct. 7, 1916. T. C. MacMillan, Clerk.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be true and complete copies of the certain libel and interrogatories, filed in said court, on the second day of August, 1915, citation issued out of the clerk's office of said court, on the 27th day of August, 1915, together with the marshal's return thereon endorsed and filed on the fourth day of September, 1915, exceptions of the Indiana Transportation Company, filed October 2, 1915, order entered of record on the 24th day of July, 1916, exceptions of the Indiana Transportation Company to amended libel, filed September 2, 1916, order entered of record on the 18th day of September, 1916, and exceptions of Indiana Transportation Company, to the amended libel, filed October 7, 1916, in the cause entitled James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, *et al. vs.* St. Joseph-Chicago Steamship Company *et al.*, as the same appear from the original records and files thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this 9th day of January, 1917.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, IN ADMIRALTY.

To the Honorable Judges of the District Court of the United States in and for said District and Division:

The amended libel of—

James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, et al., against the St. Joseph-Chicago Steamship Company, a corporation; the Indiana Transportation Company, a corporation; the Dunham Towing & Wrecking Company, a corporation; the City of Chicago, a corporation; the Chicago Railways Company, a corporation; M. H. McGovern, the M. H. McGovern Company, a corporation; the Great Lakes Dredge & Dock Company, a corporation; Cohen & Co., a corporation; Ferdinand W. Peck, the Sanitary District of Chicago, a corporation; and Western Electric Company, a corporation, respondents, filed by leave of court first had and obtained herein.

James F. Bishop, administrator of the estate of Marie Adamkiewicz, deceased;
James F. Bishop, administrator of the estate of Harold E. Andren, deceased;
James F. Bishop, administrator of the estate of Frances Badalensky, deceased;
James F. Bishop, administrator of the estate of Harry Baia, deceased;
James F. Bishop, administrator of the estate of Morris W. Baldwin, deceased;
James F. Bishop, administrator of the estate of Paul Bannach, deceased;
James F. Bishop, administrator of the estate of Edward S. Bartlett, deceased;

James F. Bishop, administrator of the estate of Margaret Becker, deceased;
James F. Bishop, administrator of the estate of Agnes Behrendt, deceased;
James F. Bishop, administrator of the estate of Gertrude Behrendt, deceased;
James F. Bishop, administrator of the estate of Charles Bender, deceased;
James F. Bishop, administrator of the estate of Le Roy D. Bennett, deceased;
James F. Bishop, administrator of the estate of Myrtle J. Berglund, deceased,
James F. Bishop, administrator of the estate of David A. Bergman, deceased;
James F. Bishop, administrator of the estate of Ida May Berlin, deceased;
James F. Bishop, administrator of the estate of David G. Benson, deceased;
James F. Bishop, administrator of the estate of Joseph Bertrand, deceased;
James F. Bishop, administrator of the estate of Frederick Biehl, deceased;
James F. Bishop, administrator of the estate of Matthew J. Bonga, deceased;
James F. Bishop, administrator of the estate of Elizabeth Bosch, deceased;
James F. Bishop, administrator of the estate of Oliver J. Bouffard, deceased;
James F. Bishop, administrator of the estate of Harriet Budner, deceased;
James F. Bishop, administrator of the estate of Arthur Buege, deceased;
James F. Bishop, administrator of the estate of Annie Buth, deceased;
James F. Bishop, administrator of the estate of Anna Brenner, deceased;

James F. Bishop, administrator of the estate of Thomas J. Carroll, deceased;
James F. Bishop, administrator of the estate of Nellie Casper, deceased;
James F. Bishop, administrator of the estate of Frieda Christiansen, deceased;
James F. Bishop, administrator of the estate of Rose V. Cullen, deceased;
James F. Bishop, administrator of the estate of Fred J. Dankers, deceased;
James F. Bishop, administrator of the estate of Lillian Davis, deceased;
James F. Bishop, administrator of the estate of Martha A. Darkar, deceased;
James F. Bishop, administrator of the estate of Earl H. Dawson, deceased;
James F. Bishop, administrator of the estate of Charles Doll, deceased;
James F. Bishop, administrator of the estate of Robert Doll, deceased;
James F. Bishop, administrator of the estate of Eleanora Doneske, deceased;
James F. Bishop, administrator of the estate of Florence T. Drury, deceased;
James F. Bishop, administrator of the estate of John Dudek, deceased;
James F. Bishop, administrator of the estate of Mary Dudek, deceased;
James F. Bishop, administrator of the estate of Minnie Dziondziak, deceased;
James F. Bishop, administrator of the estate of Bessie Dvorak, deceased, and all other intervening libelants,

against the St. Joseph-Chicago Steamship Company, a corporation organized and existing under the laws of the State of Michigan; the Indiana

Transportation Company, a corporation organized and existing under the laws of the State of Indiana; the Dunham Towing & Wrecking Company, a corporation organized and existing under the laws of the State of Illinois; the City of Chicago, a municipal corporation organized and existing under the laws of the State of Illinois; the Chicago Railways Company, a corporation organized and existing under the laws of the State of Illinois; M. H. McGovern, the M. H. McGovern Company, a corporation organized and existing under the laws of the State of Illinois; the Great Lakes Dredge & Dock Company, a corporation organized and existing under the laws of the State of Illinois; Cohen & Co., a corporation organized and existing under the laws of the State of Illinois; Ferdinand W. Peck, the Sanitary District of Chicago, a corporation organized and existing under the laws of the State of Illinois; and the Western Electric Company, a corporation organized and existing under the laws of the State of Illinois; and each and all of said corporations at the times hereinafter mentioned, exercising its and their corporate powers and authority, and acting and carrying on its and their business, as such corporation and corporations, in said State of Illinois, under the laws of the State of Illinois and of the United States of America, in a cause of damage, civil and maritime, allege as follows:

First. Said James F. Bishop alleges that he is administrator of the estates of deceased persons, and each thereof, as above set forth, duly appointed and qualified to act as such.

Said Anton Schultz alleges that he is administrator of the estate of John Schultz, deceased, as above set forth, duly appointed and qualified to act as such.

Said Samuel Ginsberg alleges that he is administrator of the estate of Philip L. Ginsberg, deceased, as above set forth, duly appointed and qualified to act as such.

Said Raymond Appelt alleges that he is administrator of the estate of Leo Lewicki, deceased, as above set forth, duly appointed and qualified to act as such.

Said Mary Murphy alleges that she is administratrix of the estate of David M. Murphy, deceased, as above set forth, duly appointed and qualified to act as such.

John A. Fitzgerald alleges that he is administrator of the estate of Mary Murphy, deceased, as above set forth, duly appointed and qualified to act as such.

Rosie Albertz alleges that she is administratrix of the estate of Mary Albertz, deceased, as above set forth, duly appointed and qualified to act as such.

Richard Clarke alleges that he is administrator of the estate of Robert L. Clarke, deceased, as above set forth, duly appointed and qualified to act as such.

Harry Evenhouse alleges that he is administrator of the estates of Annie Evenhouse, deceased, and Jennie Evenhouse, deceased, and each thereof, as above set forth, duly appointed and qualified to act as such.

Anton Forst alleges that he is administrator of the estate of Emma Marie Forst, as above set forth, duly appointed and qualified to act as such.

Lillian S. Schmalz alleges that she is administratrix *de bonis non* of the estate of Nels Peter Johnson, deceased, as above set forth, duly appointed and qualified to act as such.

Martha Mundt alleges that she is administratrix of the estates of Catherine Trogg, deceased, and Charles Trogg, deceased, and each thereof, as above set forth, duly appointed and qualified to act as such.

And each of said above-named parties who is administrator or administratrix, as aforesaid, alleges that he or she was duly appointed as such by the Probate Court of Cook County, Illinois, and each of said parties brings into court his or her

letters of administration, to him or her granted by the honorable Probate Court of Cook County, Illinois, and makes proffer of same to the court.

Second. And said libelants, on information and belief, allege that on July 24, A. D. 1915, said St. Joseph-Chicago Steamship Company was the owner of a steamer known as the *Eastland*, and had chartered said steamer to said Indiana Transportation Company, for the purpose of carrying passengers thereon to Michigan City, Indiana, from a point on the Chicago River, which said river then and there was connected with Lake Michigan and the Great Lakes and was a navigable river of the navigable waters of the United States, under, and just west of, the Clark street bridge which crosses said river, in the city of Chicago, county of Cook and State of Illinois, in the district and division aforesaid, and said Dunham Towing & Wrecking Company was operating and in charge and control of a tugboat known as the *Kenosha*, which was attached to said steamer *Eastland* by a tow line or otherwise, at the point aforesaid on said Chicago River, and said steamer and tugboat were then and there being used by said St. Joseph-Chicago Steamship Company, said Indiana Transportation Company, and said Dunham Towing & Wrecking Company, in the business of commerce and navigation upon Lake Michigan and its tributary waters, including said Chicago River.

Third. That on said 24th day of July, A. D. 1915, said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company, during the lifetime of each of said above-named deceased persons, accepted as a passenger on said steamer each of said persons, and also accepted as a passenger on said steamer each of said other above-named libelants, at the point above described on said Chicago River, in the city of Chicago, county of Cook and State of Illinois, in the District and Division aforesaid, for the purpose of conveying them, and each of them, as such passengers, to Michigan City, Indiana, on said steamer, from said point

of their acceptance as passengers as aforesaid, and while attempting so to do then and there carelessly, negligently, wilfully, wantonly, wrongfully and improperly so managed, operated and controlled said steamer that by reason of such wrongful and negligent conduct on their part, and also the wrongful and negligent conduct on the part of said other above-named defendants herein, as hereinafter set forth, said steamer then and there tipped over on its side in said Chicago River, at the point in and on said river above described, and by reason thereof each and all of said above-named deceased persons was and were then and there killed, and each and all of said other above-named libelants was and were then and there greatly, severely, violently and permanently injured, both internally and externally, and by reason of such injuries have suffered, are suffering and will permanently continue to suffer great bodily pain and mental anguish, and have been hindered and prevented from attending to their usual occupations and from earning, saving and accumulating divers great gains and profits which otherwise they would have earned, saved and accumulated, and have paid and become liable to pay large sums of money in endeavoring to be cured of their said injuries so sustained by them as aforesaid, and each and all of said passengers so lost their lives and sustained such injuries while in the exercise of due care without fault or negligence on his, her or their part.

Fourth. That at the time and place of the tipping over of said steamer as aforesaid, said Dunham Towing & Wrecking Company so carelessly, negligently, wilfully, wantonly, wrongfully and improperly manned, operated and controlled its said tugboat while so attached to said steamer as aforesaid, that thereby, in connection with said wrongful, negligent and improper conduct of said other respondents, said steamer then and there was caused to and did tip over as aforesaid.

Fifth. That on said 24th day of July, A. D. 1915, and

for many years prior to said time, said city of Chicago owned, and was in the possession of, and had and exercised charge, control, management and supervision, of and over, and throughout all parts of, the harbor of said city of Chicago, including said Chicago River and also the docks along said river and particularly that part of said river at and in the vicinity of the point in and on said river above described where said steamer tipped over as aforesaid, and also all other points in, and parts of, said river and harbor, said harbor being more particularly described in and by an ordinance of said city of Chicago, as hereinafter set forth; and it was then and there the duty of said city of Chicago to have and keep said river, particularly at and in the vicinity of the point in said river where said steamer tipped over as aforesaid, and also all other points in, and parts of, said river and harbor, free and clear of and from any and all obstructions of any and every kind and nature whatsoever, which might, could or would interfere with the navigation of any and all sailing and steam vessels, including said steamer *Eastland,* in said Chicago River; and said city of Chicago also then and there had and exercised charge, control, management and supervision, of and over all sailing and steam vessels, including said steamer *Eastland,* and the anchoring, docking, loading, moving and navigation thereof, in said Chicago River, and particularly at the point in said river where said steamer tipped over as aforesaid, and also at any and all other points in, and parts of, said river and harbor, and charged and collected from the owners and those in possession and control of said steamers, including said steamer *Eastland,* rental license and other moneys, for the permission and privileges of anchoring, docking, loading, moving, and navigating of said vessels in said river and harbor; and it then and there became and was the duty of said city of Chicago to have and keep the water in said river of a proper depth, and to have and keep said river and its bed and all parts of said river, and the docks along the same, particularly at the point in said river where said steamer

tipped over as aforesaid, and also at any and all other points in, and parts of, said river and said harbor, in a proper condition for the safety of each and all of said steamers, including said steamer *Eastland,* and all persons thereon, including said above-named deceased persons and said other above-named libelants, and to prevent the improper and unsafe anchoring, docking, loading, moving, and navigating of each and all of said vessels, including said steamer *Eastland,* particularly at said point in said river where said steamer tipped over as aforesaid, and also at all other points in, and parts of, said river and said harbor; yet said city of Chicago, in violation and disregard of each and all of its said duties, and of all duties imposed upon it by reason of the premises, then and there carelessly, negligently, wrongfully, and improperly, failed and refused to have and keep said river, particularly at and in the vicinity of the point in said river where said steamer tipped over as aforesaid, and also at all other points in, and parts of, said river and said harbor, free and clear of and from any and all obstructions which might, could or would, and which did, dangerously obstruct and otherwise interfere with the anchoring, docking, loading, moving, and navigating of said steamer *Eastland* in said Chicago River, and particularly at and in the vicinity of the point in said river where said steamer tipped over as aforesaid, and by reason thereof such obstructions assisted in causing and caused, then and there, said steamer to tip over as aforesaid; and said obstructions existed and were in said river for a sufficient length of time before the tipping over of said steamer; that said city of Chicago, by the exercise of reasonable care, would have discovered such obstructions in time to have removed the same, by the exercise of reasonable care, before they assisted in causing or caused said steamer to tip over as aforesaid; and said city of Chicago also then and there carelessly, negligently, wrongfully, and improperly, failed and refused to have and keep the water in said river of a proper depth,

and to have and keep said river and its bed and all parts of said river, and the docks along the same, particularly at the point in said river where said steamer tipped over as aforesaid, and also at any and all other points in, and parts of, said river and said harbor, in a proper condition for the safety of the steamer *Eastland,* and of each and all of the persons thereon, including each and all of said above-named deceased persons and said other above-named libelants, and to prevent the improper and unsafe anchoring, docking, loading, moving, and navigating of said steamer, particularly at said point in said river where said steamer tipped over as aforesaid, and also at any and all other points in, and parts of, said river and said harbor, and by reason thereof, such improper depth of said water in said river, and said improper and unsafe condition of said river and its bed and all parts of said river, and the docks along the same, then and there assisted in causing and caused said steamer to tip over as aforesaid; and said improper depth of water in said river, and said improper and unsafe condition of said river and its bed and all parts of said river and said docks along the same, and said obstructions which were dangerous to anchoring, docking, loading, moving, and navigating of said steamer, at and in the vicinity of the point in said river where said steamer tipped over as aforesaid, and which assisted in causing and caused said steamer to tip over as aforesaid, existed for a sufficient length of time before said steamer tipped over; that said city of Chicago, by the exercise of reasonable care would have discovered same in time to have prevented them, by the exercise of reasonable care, from assisting to cause, or causing, as they did, said steamer to tip over as aforesaid.

Sixth. That several years prior to said 24th day of July, A. D. 1915, said Chicago Railways Company undertook to, and did, construct a tunnel in said Chicago River, at La Salle Street, in said city of Chicago, and through its agents, said M. H. McGovern, M. H. McGovern Company and said Great Lakes Dredge & Dock Company, and others, and said M.

H. McGovern, M. H. McGovern Company and said Great Lakes Dredge and Dock Company, each for himself and itself and each as the agent of the other and also as the agent of said Chicago Railways Company, in connection with, and incidental to, the construction of said tunnel, and otherwise, carelessly, negligently, wrongfully and improperly, placed and allowed to accumulate and exist, and permitted to be and remain, in said Chicago River, at and in the vicinity of said tunnel and of the place where said steamer tipped over in said river as aforesaid, and carelessly, negligently, wrongfully and improperly, failed and refused to remove therefrom, piling, debris and other material, substance and obstructions, which might, could or would, and which on said 24th day of July, A D. 1915, did, dangerously obstruct and otherwise interfere with the anchoring, docking, loading, moving and navigating of said steamer, and which, on said 24th day of July, A. D. 1915, assisted in causing and caused said steamer, while the stern of said steamer was over said tunnel, to tip over on its side with its stern upon the top of said tunnel, in said river, as and at the place aforesaid.

Seventh. That on the 24th day of July, A. D. 1915, and for several months and years prior to that time, said Cohen & Company and said Ferdinand W. Peck were the owners and were in possession and control, of certain premises, including the buildings thereon, abutting on said Chicago River at the place where said steamer tipped over as aforesaid, and then and there themselves and through their agents carelessly, negligently, wrongfully and improperly, threw, dumped, or otherwise placed, and permitted to be thrown, dumped or otherwise placed, and allowed to be and remain, stone, brick, earth, cement, garbage, debris, and other substance and material, in said river, at and in the vicinity of the place in said river where said steamer tipped over as aforesaid, and carelessly, negligently, wrongfully and improperly, failed and refused to remove such stone, cement,

wood, garbage, debris, material and other substance from said river, which said stone, cement, wood, garbage, debris, material and other substance dangerously obstructed and otherwise interfered with the anchoring, docking, loading, moving and navigating of said steamer, and assisted in causing and caused said steamer to tip over on and at the time and place aforesaid.

Eighth. That on said 24th day of July, A. D. 1915, and for several years prior to that time, said Sanitary District of Chicago was in possession of, and had and exercised charge, control and management and supervision over, said Chicago River from the place of its junction with Lake Michigan to Lockport, Illinois, including the part of said river at and in the vicinity of the place where said steamer tipped over in said river as aforesaid, and it then and there carelessly, negligently, wrongfully and improperly, failed and refused to have and keep the water in said river of a proper depth for the safety of the steamer *Eastland,* and all persons thereon, including each and all of said above-named deceased persons and said other above-named libelants, and carelessly, negligently, wrongfully and improperly failed and refused to have and keep said river and its bed and all parts of said river free and clear of and from any and all obstructions which might, could or would, and which on said 24th day of July, A. D. 1915, did dangerously obstruct and otherwise interfere with the anchoring, docking, loading, moving and navigating of said steamer *Eastland,* and which assisted in causing and caused said steamer to tip over, in said Chicago River, as and at the time and place aforesaid.

Ninth. That on said 24th day of July, A. D. 1915, said Western Electric Company carelessly, negligently, wrongfully and improperly provided said steamer for the carriage of said above-named deceased persons and said other above-named persons who are libelants herein, and each of said persons, as passengers on said steamer, from said point in said river where said steamer tipped over as aforesaid, to

Michigan City, Indiana, and then and there invited and permitted said persons, and each of them, to board and be and remain on said steamer at said point in said river when the conditions of and surrounding said steamer and said river at said point were such that it was dangerous and unsafe for said persons then and there to board and be and remain on said steamer, on account of the overloading of said steamer and of insufficient water in, and improper and negligent operation by the crew of said steamer of, the ballast tanks in said steamer, and encroachments upon, and obstructions and lack of proper depth of water in, said river at said point, and without a proper license or permit having been granted by the city of Chicago for said persons to board said steamer, at said time and place, in violation of Chap. XIII of the ordinances of said city of Chicago, contained in the Chicago Code of 1911, as hereinafter set forth, and then and there carelessly, negligently, wrongfully and improperly controlled, managed and operated, and permitted to be controlled, managed and operated, said steamer, at the time and place aforesaid, and by reason of such wrongful, negligent, and improper conduct on its part, in connection with said wrongful, negligent and improper conduct on the part of said other respondents, said steamer then and there was caused to and did tip over as and at said time and place.

Tenth. Said libelants, not being advised of all that took place and of all conditions existing on and in connection with said steamer and tugboat, and of the condition of said Chicago River and its docks, at and before the time of the tipping over of the said steamer as aforesaid, and therefore reserving the right to claim the benefit of any and all faults causing such tipping over of said steamer which may appear upon a full hearing herein, on information and belief allege that said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company, in addition to their negligent and wrongful conduct above set forth, were guilty

of the following specific faults which caused said steamer so to tip over.

Eleventh. And under an act to provide for incorporation of cities and villages, passed by the General Assembly of the State of Illinois, approved April 10, 1872, and in force July 1, 1872, and adopted by said city of Chicago on, to wit, April 23, A. D. 1875, and which is set forth in Hurd's Revised Statutes of Illinois (1912 Edition), in chapter 24 thereof, it is provided in paragraphs twenty-eighth to fortieth of Article V of said act, that city councils in cities adopting said act should have the following powers:

"Twenty-eighth. To construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof.

"Twenty-ninth. To construct and keep in repair culverts, drains, sewers and cesspools and to regulate the use thereof.

"Thirtieth. To deepen, widen, dock, cover, wall, alter or change channel of water courses.

"Thirty-first. To construct and keep in repair canals and slips for the accommodation of commerce.

"Thirty-second. To erect and keep in repair public landing places, wharves, docks and levees.

"Thirty-third. To regulate and control the use of public and private landing places, wharves, docks and levees.

"Thirty-fourth. To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

"Thirty-fifth. To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.

"Thirty-sixth. To fix the rate of wharfage and dockage.

"Thirty-seventh. To collect wharfage and dockage from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation.

"Thirty-eighth. To make regulations in regard to

use of harbors, towing of vessels, opening and passing of bridges.

"Thirty-ninth. To appoint harbor masters and define their duties.

"Fortieth. To provide for the cleansing and purification of waters, water courses and canals, and the draining or filling of ponds on private property, whenever necessary to abate or prevent nuisances."

And said city of Chicago, in addition to its negligent and wrongful conduct above set forth, was guilty of the following faults which caused, and concurred with the negligence of said other respondents in causing, said steamer to tip over as aforesaid:

1. Said St. Joseph-Chicago Steamship Company and said Indiana Transportation Company, were negligent in using a steamer which was, and which they knew, or by the exercise of proper care would have known, to be, unsafe and unseaworthy.

2. That they were negligent in permitting a large number of passengers to board said steamer without attending to their duty to see that proper precautions were taken, and without taking proper precautions, to protect said passengers from harm and injury.

3. That they were negligent in allowing a larger number of passengers to board said steamer than safely and properly could be carried thereon.

4. That they were negligent in not providing proper and competent servants, and a sufficient number of such servants, to manage, control and operate said steamer.

5. That they were negligent in not providing sufficient competent employees to properly manage, control and operate said steamer, and in providing employees who negligently and improperly managed, controlled and operated said steamer.

6. That they were negligent in not providing proper ballast tanks and other apparatus and appliances to prevent said steamer tipping over.

7. That they were negligent in improperly operating, controlling and managing the ballast tanks, apparatus and appliances which were provided on said steamer.

8. That they were negligent in allowing a large number of passengers to board said steamer, and in moving and attempting to move said steamer with its ballast tanks partially or wholly unfilled with water.

9. That they were negligent in disconnecting the ropes and cables by which said steamer was attached to its dock.

10. That they were negligent in moving and in attempting to move or have moved said steamer when it was, and when they knew, or by the exercise of proper care would have known, that it was, in an improper and unsafe condition to be moved.

11. That they were negligent in moving and in attempting to move or have moved said steamer when it was, and when they knew, or by the exercise of proper care would have known, that it was, in an improper and unsafe condition to be moved.

11. That they were negligent in moving and in attempting to move or have moved said steamer in an improper and unsafe manner and under conditions rendering it improper and unsafe for said steamer so to be moved.

12. That they were negligent in allowing and in ordering the tug working with said steamer to move and tow and to attempt to move and tow said steamer under improper and unsafe conditions and in an improper and unsafe manner.

13. That they were negligent in allowing and in ordering said tug to move and tow and to attempt to move and tow said steamer when said steamer was, and when they knew, or by the exercise of proper care would have known, that said steamer was, in an improper and unsafe condition to be moved and towed.

14. That they were negligent in not warning and ordering the passengers on said steamer to leave and disembark therefrom, when it was, and when they, said companies, knew, or

by the exercise of proper care would have known, that it was, dangerous and unsafe for such passengers to remain thereon.

15. That they were negligent in allowing passengers to board said steamer when it was, and when they, said companies, knew, or by the exercise of proper care would have known, that it was, dangerous and unsafe for such passengers to board same.

16. That they were negligent in permitting a large number of passengers to board said steamer without previously having had said steamer properly inspected and tested to determine whether such steamer was properly constructed and equipped and in proper condition, and without having previously made sufficient investigation to determine whether the conditions surrounding said steamer at the time and place in question were proper, to safely allow such large number of passengers to be on said steamer at said time and place.

17. That they were negligent in permitting a large number of passengers to board said steamer when said steamer was not, and when they, said companies, knew, or by the exercise of proper care would have known, that said steamer was not, properly constructed and equipped and in proper condition, and when they, said companies, knew, or by the exercise of proper care would have known, that the conditions surrounding said steamer at the time and place in question were not proper, to safely allow such large number of passengers to be on said steamer at said time and place.

18. That they negligently permitted a large number of passengers to board said steamer without having had proper inspections and tests made to determine whether said steamer was sufficiently stable and in proper condition, and whether the conditions surrounding said steamer at the time and place in question were proper, to safely allow such number of passengers to be on said steamer at said time and place, and negligently permitted such large number of passengers

to board same when it was not, and when they, said companies, knew, or by the exercise of proper care would have known, that it was not, sufficiently stable and in proper condition for such purpose, and when they, said companies, knew, or by the exercise of reasonable care would have known, that the conditions surrounding said steamer at the time and place in question were not proper for said purpose at said time and place.

19. They negligently failed to provide sufficient and proper life-saving apparatus and equipment on board said steamer for the number of passengers permitted by them to board, and who did board, said steamer, and negligently failed to have properly accessible for such passengers such life-saving apparatus and equipment as was provided thereon.

20. They negligently failed to use proper care to protect from harm and injury the passengers permitted by them to board said steamer, when said steamer was, and when they, said companies, knew, or by the exercise of proper care would have known, that it was, in danger of tipping over.

21. They negligently and wantonly permitted said steamer to be overloaded with a great amount of freight and supplies and other paraphernalia in addition to the large number of passengers permitted by them to be thereon, without taking proper precautions and exercising proper care to make said steamer stable and safe for said passengers at the time and place it tipped over.

22. They were warned of the danger of said steamer tipping over a sufficient length of time before it did tip over, to have enabled them by the exercise of proper care to cause all or a portion of said passengers to safely disembark from said steamer before it tipped over and prevent it from tipping over, yet they carelessly, negligently, wilfully, and wantonly failed and refused to heed such warnings and exercise such care.

23. They carelessly, negligently, wilfully, and wantonly failed to use proper care to protect from harm and injury

said passengers by making proper inspection and investigation of the river, river bed, and dock at and surrounding the place aforesaid where said passengers boarded said steamer, before said steamer tipped over.

24. They carelessly, negligently, wilfully, and wantonly permitted a large number of passengers to board said steamer at the place aforesaid where said passengers did board said steamer, when the condition of said steamer and of the river, river bed, and dock at and surrounding said place was such that it was dangerous and unsafe for such large number of passengers then and there to board said steamer.

25. In the loading and operating of said steamer they knowingly, negligently, and wantonly experimented with the safety of the passengers on said steamer when said passengers were, and when they, said companies, knew, or by the exercise of proper care would have known, that said passengers were, in danger of harm and injury.

26. They negligently and wantonly permitted a large number of passengers to board said steamer at a time and place when and where it was dangerous and unsafe for such large number of passengers to board said steamer, when they, said companies, knew, or by the exercise of proper care would have known, of such danger.

27. They negligently, and wilfully and wantonly, permitted passengers to continue to board said steamer when it was, and when they, said companies, knew, or by the exercise of proper care would have known, that it was, dangerous and unsafe for passengers to continue to board said steamer.

28. They negligently and wantonly permitted a large number of passengers to board said steamer at a dock where it was not customary for passengers to board said steamer, without making proper investigation to determine whether it was safe, and when it was unsafe, for such large number of passengers to board said steamer at said dock.

29. They negligently permitted said steamer to list and

continue to list until it tipped over, without taking proper precautions to prevent it from tipping over.

30. They negligently and knowingly operated said steamer while it was listing in a dangerous manner before it tipped over.

31. They negligently failed to exercise proper care to prevent said steamer from tipping over.

32. They negligently loaded, managed, controlled, and operated said steamer, so that it did tip over.

33. They negligently and knowingly and wilfully and wantonly failed to obtain a proper permit from the city of Chicago, or any other proper party, to dock and load with passengers said steamer at the time and place where it tipped over, and negligently, knowingly, wilfully, and wantonly docked and loaded with passengers said steamer at said time and place without such a permit, and without making proper investigation and using proper care to protect from harm and injury such passengers at said time and place.

34. They negligently, knowingly, wilfully, and wantonly obtained from the Government of the United States, and made use of, a certificate providing for the carriage of twenty-five hundred passengers, in addition to a crew, on said steamer, without having had any proper investigation made to determine how many passengers it was safe to carry on said steamer, and negligently permitted a larger load to be upon said steamer at the time and place it tipped over than properly and safely could be thereon at said time and place.

35. They negligently failed to provide proper exits for passengers from said steamer, so as to properly protect from harm and injury the passengers whom they had permitted to board, and who were on, said steamer at the time and place when and where it tipped over.

36. They negligently, wrongfully, knowingly, and wilfully conducted their business of carrying passengers for hire at the place where said steamer tipped over, as aforesaid,

without having a license issued by the city of Chicago authorizing them to carry on such business at said place, and without having a license from said city of Chicago designating such place as a place where they could carry on such business, contrary to and in violation of the provisions of Chapter XIII of the Chicago Code of 1911, of the ordinances of said city of Chicago, which is hereinafter set forth.

37. They then and there so carelessly, negligently, wrongfully, and improperly operated, controlled, and managed their said steamer that it then and there struck on obstructions underneath it in said river.

Tenth. And said Dunham Towing & Wrecking Company in addition to its negligent and wrongful conduct above set forth, was guilty of the following faults which caused said steamer to tip over as aforesaid.

1. It negligently attempted to move and tow, and did move and tow, said steamer when it was not, and when it, said company, knew, or by the exercise of proper care would have known, that said steamer was not, in a safe and proper condition to be moved and towed.

2. It negligently attempted to move and tow, and did move and tow, said steamer in an improper and unsafe manner.

3. It negligently managed, operated, and controlled its said tugboat while same was attached to said steamer.

4. It negligently failed to give proper warning and to exercise proper care to prevent said steamer tipping over.

(Here follow many pages of averments purporting to charge defendants other than the St. Joseph-Chicago Steamship Company and the Indiana Transportation Company.

Said amended libel therein charges that "each and all of said respondents combined and concurred in causing the steamer to tip" and this averment is followed by allegations of injury and damage as to each libellant.)

IN THE UNITED STATES DISTRICT COURT,
For Northern District of Illinois, Eastern Division:

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of excerpts from amended libel in case number 32,236, wherein James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, *et al.*, are libelants, and St. Joseph-Chicago Steamship Company *et al.*, are respondents, as same appears from the original—filed in said court on the twenty-fourth day of July, A. D. 1916, and now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district this twelfth day of January, A. D. 1917.

[SEAL.] T. C. MACMILLAN. *Clerk.*

[Endorsed:] Supreme Court U. S., October Term, 1916. Term No. 25, Original. *Ex parte;* In the Matter of the Indiana Transportation Company, petitioner. Return of respondent to rule to show cause. Filed January 15, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 25, Original.

EX PARTE: IN THE MATTER OF THE INDIANA TRANSPORTATION COMPANY, PETITIONER.

MOTION OF CERTAIN PARTIES TO FILE A RETURN TO RULE TO SHOW CAUSE.

HARRY W. STANDIDGE,
Proctor for the Moving Parties.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 25, Original.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR A WRIT OF PROHIBITION.

To CHARLES E. KREMER, Esquire,
Proctor for Petitioner:

Please take notice that on Monday, January 15, A. D. 1917, at the opening of court, or as soon thereafter as counsel can be heard, I shall present to the court a motion, a copy of which is hereto attached and herewith handed to you.

HARRY W. STANDIDGE,
Proctor for Parties Making Aforesaid Motion.

Received copy of above notice and motion referred to therein and attached thereto, this 11th day of January, A. D. 1917.

C. E. KREMER,
RUSSELL MOTT,
Proctors for Petitioner.

1k

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 25, Original.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR A WRIT OF PROHIBITION.

Motion of Certain Parties to File Instanter a Return to the Rule Heretofore Entered to Show Cause Why the Prayer of the Petition for a Writ of Prohibition Should Not be Granted Herein, and Brief in Support of Such Return, Because of Such Parties' Interest in the Result or as Friends of the Court.

And now come:

James F. Bishop, administrator of the estate of Marie Adamkiewiez, deceased;

James F. Bishop, administrator of the estate of Alfred E. Anderson, deceased;

James F. Bishop, administrator of the estate of Otto E. Anderson, deceased;

James F. Bishop, administrator of the estate of Harold E. Andren, deceased;

James F. Bishop, administrator of the estate of Amily Androvits, deceased;

James F. Bishop, administrator of the estate of Emerenc Androvits, deceased;

James F. Bishop, administrator of the estate of Sunna Androvits, deceased;

James F. Bishop, administrator of the estate of Frances Badalensky, deceased;
James F. Bishop, administrator of the estate of Harry Baia, deceased;
James F. Bishop, administrator of the estate of Morris W. Baldwin, deceased;
James F. Bishop, administrator of the estate of Paul Bannach, deceased;
James F. Bishop, administrator of the estate of Edward S. Bartlett, deceased;
James F. Bishop, administrator of the estate of Margaret Becker, deceased;
James F. Bishop, administrator of the estate of Florence Begitske, deceased;
James F. Bishop, administrator of the estate of Agnes Behrendt, deceased;
James F. Bishop, administrator of the estate of Gertrude Behrendt, deceased;
James F. Bishop, administrator of the estate of William Belmonti, deceased;
James F. Bishop, administrator of the estate of Charles Bender, deceased;
James F. Bishop, administrator of the estate of Samuel Benn, deceased;
James F. Bishop, administrator of the estate of Le Roy D. Bennett, deceased;
James F. Bishop, administrator of the estate of David G. Benson, deceased;
James F. Bishop, administrator of the estate of Myrtle J. Berglund, deceased;
James F. Bishop, administrator of the estate of David A. Bergman, deceased;
James F. Bishop, administrator of the estate of Harry D. Bergquist, deceased;
James F. Bishop, administrator of the estate of Ida May Berlin, deceased;

James F. Bishop, administrator of the estate of Joseph Bertrand, deceased;
James F. Bishop, administrator of the estate of Mathilda Beutelspacher, deceased;
James F. Bishop, administrator of the estate of Frederick Biehl, deceased;
James F. Bishop, administrator of the estate of Frank J. Binkley, deceased;
James F. Bishop, administrator of the estate of Carl Bluch, deceased;
James F. Bishop, administrator of the estate of Matthew J. Bonga, deceased;
James F. Bishop, administrator of the estate of Elizabeth Bosch, deceased;
James F. Bishop, administrator of the estate of Oliver J. Bouffard, deceased;
James F. Bishop, administrator of the estate of Anna Braitsch, deceased;
James F. Bishop, administrator of the estate of Frederick Braitsch, deceased;
James F. Bishop, administrator of the estate of Gertrude Braitsch, deceased;
James F. Bishop, administrator of the estate of Hattie Braitsch, deceased;
James F. Bishop, administrator of the estate of John Braitsch, deceased;
James F. Bishop, administrator of the estate of Marie Braitsch, deceased;
James F. Bishop, administrator of the estate of Thomas F. Brennan, deceased;
James F. Bishop, administrator of the estate of Anna Brenner, deceased;
James F. Bishop, administrator of the estate of Harriet Budner, deceased;
James F. Bishop, administrator of the estate of Arthur Buege, deceased;

James F. Bishop, administrator of the estate of Anna Buth, deceased;
James F. Bishop, administrator of the estate of Thomas J. Carroll, deceased;
James F. Bishop, administrator of the estate of Nellie Casper, deceased;
James F. Bishop, administrator of the estate of Mary Ceranek, deceased;
James F. Bishop, administrator of the estate of Michael Chamberlain, deceased;
James F. Bishop, administrator of the estate of Frieda Christiansen, deceased;
James F. Bishop, administrator of the estate of Marie Eleanor Clarke, deceased;
James F. Bishop, administrator of the estate of Signa Carke, deceased;
James F. Bishop, administrator of the estate of Celia Colombik, deceased;
James F. Bishop, administrator of the estate of Rose V. Cullen, deceased;
James F. Bishop, administrator of the estate of John Daly, deceased;
James F. Bishop, administrator of the estate of Fred J. Dankers, deceased;
James F. Bishop, administrator of the estate of Martha A. Darkar, deceased;
James F. Bishop, administrator of the estate of Lillian Davis, deceased;
James F. Bishop, administrator of the estate of John Debnar, deceased;
James F. Bishop, administrator of the estate of Caroline M. De Tamble, deceased;
James F. Bishop, administrator of the estate of Paul Dolgner, deceased;
James F. Bishop, administrator of the estate of Charles Doll, deceased;

James F. Bishop, administrator of the estate of Robert Doll, deceased;
James F. Bishop, administrator of the estate of Eleanora Doneske, deceased;
James F. Bishop, administrator of the estate of Florence T. Drury, deceased;
James F. Bishop, administrator of the estate of John Dudek, deceased;
James F. Bishop, administrator of the estate of Mary Dudek, deceased;
James F. Bishop, administrator of the estate of Bessie Dvorak, deceased;
James F. Bishop, administrator of the estate of Minnie Dziondziak, deceased;
James F. Bishop, administrator of the estate of Mary Helen Egan, deceased;
James F. Bishop, administrator of the estate of Nick Elecks (alias Illick), deceased;
James F. Bishop, administrator of the estate of Harry Engenhart, deceased;
James F. Bishop, administrator of the estate of Angela Etzkorn, deceased;
James F. Bishop, administrator of the estate of William Feehan, deceased;
James F. Bishop, administrator of the estate of Dorothy Fitzgerald, deceased;
James F. Bishop, administrator of the estate of Nellie Fitzgerald, deceased;
James F. Bishop, administrator of the estate of Henry Flemming, deceased;
James F. Bishop, administrator of the estate of Emil Flicek, deceased;
James F. Bishop, administrator of the estate of Harry L. Foster, deceased;
James F. Bishop, administrator of the estate of Marie Frackowiak, deceased;

James F. Bishop, administrator of the estate of Alice Frederick, deceased;
James F. Bishop, administrator of the estate of Yadwiga Freilich, deceased;
James F. Bishop, administrator of the estate of Anna Frisina, deceased;
James F. Bishop, administrator of the estate of Philip Frisina, deceased;
James F. Bishop, administrator of the estate of Marie Gabriel, deceased;
James F. Bishop, administrator of the estate of Edward Gatens, deceased;
James F. Bishop, administrator of the estate of Wladyslaw Gecewicz, deceased;
James F. Bishop, administrator of the estate of Emily Genda (alias Gonda), deceased;
James F. Bishop, administrator of the estate of Clara Gorney, deceased;
James F. Bishop, administrator of the estate of Ellen Marie Gradert, deceased;
James F. Bishop, administrator of the estate of Frank Grajek, deceased;
James F. Bishop, administrator of the estate of Clara Grandt, deceased;
James F. Bishop, administrator of the estate of Tillie Grandt, deceased;
James F. Bishop, administrator of the estate of Emily H. Greabner, deceased;
James F. Bishop, administrator of the estate of Leonardo Greco, deceased;
James F. Bishop, administrator of the estate of Edward Grimms, deceased;
James F. Bishop, administrator of the estate of Katarzyna Grochowski, deceased;
James F. Bishop, administrator of the estate of Emma Grossman, deceased;

James F. Bishop, administrator of the estate of Helen Grzeskowiak, deceased;
James F. Bishop, administrator of the estate of William Guenther, deceased;
James F. Bishop, administrator of the estate of Frank Hajduk, deceased;
James F. Bishop, administrator of the estate of Theodore Hallas, deceased;
James F. Bishop, administrator of the estate of Katherine Margaret Hamilton, deceased;
James F. Bishop, administrator of the estate of Inga L. Hammersted, deceased;
James F. Bishop, administrator of the estate of Harold Hans Hansen, deceased;
James F. Bishop, administrator of the estate of Elizabeth Harke, deceased;
James F. Bishop, administrator of the estate of John F. Hawkins, deceased;
James F. Bishop, administrator of the estate of Mary Hefferen, deceased;
James F. Bishop, administrator of the estate of John Helfenbien, deceased;
James F. Bishop, administrator of the estate of Barbara Elizabeth Hengels, deceased;
James F. Bishop, administrator of the estate of Henry Hill, deceased;
James F. Bishop, administrator of the estate of Mary Hill, deceased;
James F. Bishop, administrator of the estate of Anna Hillmann, deceased;
James F. Bishop, administrator of the estate of William Hinczewska, deceased;
James F. Bishop, administrator of the estate of Clifford Edward Hipple, deceased;
James F. Bishop, administrator of the estate of Cora May Hipple, deceased;

James F. Bishop, administrator of the estate of Hazel Marie Hipple, deceased;
James F. Bishop, administrator of the estate of George Holke, deceased;
James F. Bishop, administrator of the estate of William Holtz, deceased;
James F. Bishop, administrator of the estate of Vincent Holub, deceased;
James F. Bishop, administrator of the estate of Sophia Homola, deceased;
James F. Bishop, administrator of the estate of Vlasta Homola, deceased;
James F. Bishop, administrator of the estate of Ella Horazdovsky, deceased;
James F. Bishop, administrator of the estate of Emma Horazdovsky, deceased;
James F. Bishop, administrator of the estate of Ruth E. Hubbard, deceased;
James F. Bishop, administrator of the estate of Joseph Hutchinson, deceased;
James F. Bishop, administrator of the estate of Agnes Ignasiak, deceased;
James F. Bishop, administrator of the estate of Antoinette Ignasiak, deceased;
James F. Bishop, administrator of the estate of William Illig, Jr., deceased;
James F. Bishop, administrator of the estate of Albert Immel, deceased;
James F. Bishop, administrator of the estate of Antoinette Inciardi, deceased;
James F. Bishop, administrator of the estate of Stanley Jagoda, deceased;
James F. Bishop, administrator of the estate of Ignatz Jakubowska, deceased;
James F. Bishop, administrator of the estate of Antonette Jarzembowska, deceased;

James F. Bishop, administrator of the estate of Julia Jaworski, deceased;
James F. Bishop, administrator of the estate of Martha Jaworski, deceased;
James F. Bishop, administrator of the estate of Lottie Jelen, deceased;
James F. Bishop, administrator of the estate of Harry B. Johnson, deceased;
James F. Bishop, administrator of the estate of George W. Jost, deceased;
James F. Bishop, administrator of the estate of Blanche Kalal, deceased;
James F. Bishop, administrator of the estate of Agnes Kasperski, deceased;
James F. Bishop, administrator of the estate of Mary Kaszuba, deceased;
James F. Bishop, administrator of the estate of Margaret Keenan, deceased;
James F. Bishop, administrator of the estate of Mary Keenan, deceased;
James F. Bishop, administrator of the estate of Albert J. Kennedy, deceased;
James F. Bishop, administrator of the estate of Sebastian J. Kleifges, deceased;
James F. Bishop, administrator of the estate of Aloysius Kluzynska, deceased;
James F. Bishop, administrator of the estate of Lucy Kluzynska, deceased;
James F. Bishop, administrator of the estate of Helen Klemkowski, deceased;
James F. Bishop, administrator of the estate of Anna Knopik, deceased;
James F. Bishop, administrator of the estate of Anna Kolar, deceased;
James F. Bishop, administrator of the estate of Rose Kolder, deceased;

James F. Bishop, administrator of the estate of Margaret Kommer, deceased;

James F. Bisho[illegible]ministrator of the estate of Steve Kouba, [illegible]d;

James F. Bis[illegible]ministrator of the estate of Anna Koukl, deceased;

James F. Bishop, administrator of the estate of Annie Kowalski, deceased;

James F. Bishop, administrator of the estate of Julia Kowalski, deceased;

James F. Bishop, administrator of the estate of Walter Krajnik, deceased;

James F. Bishop, administrator of the estate of George M. Krich, deceased;

James F. Bishop, administrator of the estate of Helen Krzewinski, deceased;

James F. Bishop, administrator of the estate of Walter Krzewinski, deceased;

James F. Bishop, administrator of the estate of Walter Kubicki, deceased;

James F. Bishop, administrator of the estate of Mary A. Kupski, deceased;

James F. Bishop, administrator of the estate of Antoni Kwak, deceased;

James F. Bishop, administrator of the estate of Joseph La Coiza, deceased;

James F. Bishop, administrator of the estate of Casper Laline, Jr., deceased;

James F. Bishop, administrator of the estate of Walter Lange, deceased;

James F. Bishop, administrator of the estate of Nellie Latowski, deceased;

James F. Bishop, administrator of the estate of Walter Latowski, deceased;

James F. Bishop, administrator of the estate of Hattie Laurinatis, deceased;

James F. Bishop, administrator of the estate of Ignatious Leonarcxyk, deceased;
James F. Bishop, administrator of the estate of Edward Lou, deceased;
James F. Bishop, administrator of the estate of Violet Lewandowski, deceased;
James F. Bishop, administrator of the estate of John Lewicki, deceased;
James F. Bishop, administrator of the estate of Tillie Lewicki, deceased;
James F. Bishop, administrator of the estate of John W. Lockey, deceased;
James F. Bishop, administrator of the estate of Esther Lofgren, deceased;
James F. Bishop, administrator of the estate of Frances Lohr, deceased;
James F. Bishop, administrator of the estate of Barbara Lukens, deceased;
James F. Bishop, administrator of the estate of John E. Lynch, deceased;
James F. Bishop, administrator of the estate of John Lyons, deceased;
James F. Bishop, administrator of the estate of Thomas Lyons, deceased;
James F. Bishop, administrator of the estate of Julia Malecha, deceased;
James F. Bishop, administrator of the estate of Mary Malik, deceased;
James F. Bishop, administrator of the estate of Stephania Malik, deceased;
James F. Bishop, administrator of the estate of John Manikowska, deceased;
James F. Bishop, administrator of the estate of Louis Maranz, deceased;
James F. Bishop, administrator of the estate of Josephine Markowski, deceased;

James F. Bishop, administrator of the estate of Thomas Marren, deceased;
James F. Bishop, administrator of the estate of Paul Marton, deceased;
James F. Bishop, administrator of the estate of Paul Marton, Jr., deceased;
James F. Bishop, administrator of the estate of May McKenna, deceased;
James F. Bishop, administrator of the estate of John Joseph McMahon, deceased;
James F. Bishop, administrator of the estate of Edna Meicke, deceased;
James F. Bishop, administrator of the estate of Emma Meyer, deceased;
James F. Bishop, administrator of the estate of Stella Michalski, deceased;
James F. Bishop, administrator of the estate of Anna Mietlicki, deceased;
James F. Bishop, administrator of the estate of Hedwig Milcarski, deceased;
James F. Bishop, administrator of the estate of Joseph Mootz, deceased;
James F. Bishop, administrator of the estate of Catherine Moran, deceased;
James F. Bishop, administrator of the estate of Nellie Moran, deceased;
James F. Bishop, administrator of the estate of Edward Moreau, deceased;
James F. Bishop, administrator of the estate of Edwin Morizmeier, deceased;
James F. Bishop, administrator of the estate of Catherine Moynihan, deceased;
James F. Bishop, administrator of the estate of Hanora Moynihan, deceased;
James F. Bishop, administrator of the estate of John Murawski, Jr., deceased;

James F. Bishop, administrator of the estate of Anna Myszkowski, deceased;
James F. Bishop, administrator of the estate of Mildred Nepras, deceased;
James F. Bishop, administrator of the estate of Lillie Neumann, deceased;
James F. Bishop, administrator of the estate of Agnes Novotny, deceased;
James F. Bishop, administrator of the estate of Mary Novotny, deceased;
James F. Bishop, administrator of the estate of William Novotny, deceased;
James F. Bishop, administrator of the estate of Eva Nowaczyk, deceased;
James F. Bishop, administrator of the estate of Florian Nowak, deceased;
James F. Bishop, administrator of the estate of Frances Nowak, deceased;
James F. Bishop, administrator of the estate of Angeline Nyka, deceased;
James F. Bishop, administrator of the estate of Catherine O'Donnell, deceased;
James F. Bishop, administrator of the estate of Margaret Olson, deceased;
James F. Bishop, administrator of the estate of Margaret O'Neill, deceased;
James F. Bishop, administrator of the estate of Patrick O'Reilly, deceased;
James F. Bishop, administrator of the estate of Ethel Osen, deceased;
James F. Bishop, administrator of the estate of Pearl Osen, deceased;
James F. Bishop, administrator of the estate of Martha Ostrowske, deceased;
James F. Bishop, administrator of the estate of Frank Palacz, deceased;

James F. Bishop, administrator of the estate of Peter Pankowski, deceased;
James F. Bishop, administrator of the estate of Annie Parminter, deceased;
James F. Bishop, administrator of the estate of Thomas W. Parminter, deceased;
James F. Bishop, administrator of the estate of Carolina Parucka, deceased;
James F. Bishop, administrator of the estate of Anna Patrunky, deceased;
James F. Bishop, administrator of the estate of Martha Patrunky, deceased;
James F. Bishop, administrator of the estate of James H. Payne, Jr., deceased;
James F. Bishop, administrator of the estate of Albert Pecha, Jr., deceased;
James F. Bishop, administrator of the estate of Tom Perich, deceased;
James F. Bishop, administrator of the estate of Anna Pesch, deceased;
James F. Bishop, administrator of the estate of Charles F. Pierce, deceased;
James F. Bishop, administrator of the estate of Albert Pierson, deceased;
James F. Bishop, administrator of the estate of Lottie Lucy Placzek, deceased;
James F. Bishop, administrator of the estate of Susie C. Plamondon, deceased;
James F. Bishop, administrator of the estate of Mae Poch, deceased;
James F. Bishop, administrator of the estate of Mamie Ponicki, deceased;
James F. Bishop, administrator of the estate of Eleanora Poppas, deceased;
James F. Bishop, administrator of the estate of Martin Powlowski, deceased;

James F. Bishop, administrator of the estate of Lillian Prochnow, deceased;
James F. Bishop, administrator of the estate of Mike Psynko, deceased;
James F. Bishop, administrator of the estate of Anna Quaine, deceased;
James F. Bishop, administrator of the estate of Louisa Radoll, deceased;
James F. Bishop, administrator of the estate of Frank W. Rakowski, deceased;
James F. Bishop, administrator of the estate of Sophia Reis, deceased;
James F. Bishop, administrator of the estate of Anna Reitinger, deceased;
James F. Bishop, administrator of the estate of Ella Remy, deceased;
James F. Bishop, administrator of the estate of Florence Remy, deceased;
James F. Bishop, administrator of the estate of Mary Riedl, deceased;
James F. Bishop, administrator of the estate of Rosie Riedl, deceased;
James F. Bishop, administrator of the estate of Robert J. T. Riker, deceased;
James F. Bishop, administrator of the estate of Herman A. Ristow, deceased;
James F. Bishop, administrator of the estate of William F. Ristow, deceased;
James F. Bishop, administrator of the estate of May Roglin, deceased;
James F. Bishop, administrator of the estate of Clara Rohn, deceased;
James F. Bishop, administrator of the estate of Lydia Rohn, deceased;
James F. Bishop, administrator of the estate of Ella Rohse, deceased;

James F. Bishop, administrator of the estate of Lillian Rohse, deceased;
James F. Bishop, administrator of the estate of Minnie Roser, deceased;
James F. Bishop, administrator of the estate of Monicka T. Rozycki, deceased;
James F. Bishop, administrator of the estate of Blanche Rudcki, deceased;
James F. Bishop, administrator of the estate of William J. Rupp, deceased;
James F. Bishop, administrator of the estate of Elsie Rusch, deceased;
James F. Bishop, administrator of the estate of Minnie Rylands, deceased;
James F. Bishop, administrator of the estate of Rozalia Rynaszewski, deceased;
James F. Bishop, administrator of the estate of Frank Sagenbrecht, deceased;
James F. Bishop, administrator of the estate of John R. Sallwasser, deceased;
James F. Bishop, administrator of the estate of Edwin W. Schaefer, deceased;
James F. Bishop, administrator of the estate of Edward Schmelz, deceased;
James F. Bishop, administrator of the estate of Sophia M. Schmidt, deceased;
James F. Bishop, administrator of the estate of Carolina Schnell, deceased;
James F. Bishop, administrator of the estate of Nellie Schnorr, deceased;
James F. Bishop, administrator of the estate of Alma Schoenke, deceased;
James F. Bishop, administrator of the estate of Edward Schultz, deceased;
James F. Bishop, administrator of the estate of Sabina Schultz, deceased;

James F. Bishop, administrator of the estate of Verna Schultz, deceased;
James F. Bishop, administrator of the estate of Bertha Selig, deceased;
James F. Bishop, administrator of the estate of Edward Selig, deceased;
James F. Bishop, administrator of the estate of Frank Selig, deceased;
James F. Bishop, administrator of the estate of Nellie Sherlock, deceased;
James F. Bishop, administrator of the estate of Frances Siedlecka, deceased;
James F. Bishop, administrator of the estate of Wilhelm M. Siegmann, deceased;
James F. Bishop, administrator of the estate of Lena Siep, deceased;
James F. Bishop, administrator of the estate of Joseph Sierazek, deceased;
James F. Bishop, administrator of the estate of Mary Sierazek, deceased;
James F. Bishop, administrator of the estate of Solomea Slominski, deceased;
James F. Bishop, administrator of the estate of Roman Slowinski, deceased;
James F. Bishop, administrator of the estate of Margaret Smith, deceased;
James F. Bishop, administrator of the estate of Hattie Sosnowska, deceased;
James F. Bishop, administrator of the estate of Charles Stahlik, deceased;
James F. Bishop, administrator of the estate of Anna Staker, deceased;
James F. Bishop, administrator of the estate of Pauline Staker, deceased;
James F. Bishop, administrator of the estate of Hattie Steffen, deceased;

James F. Bishop, administrator of the estate of Grace W. Stevens, deceased;
James F. Bishop, administrator of the estate of Gertrude Stork, deceased;
James F. Bishop, administrator of the estate of Katie Strane, deceased;
James F. Bishop, administrator of the estate of Jennie Streit, deceased;
James F. Bishop, administrator of the estate of Mary Elizabeth Sullivan, deceased;
James F. Bishop, administrator of the estate of Benedicta Switala, deceased;
James F. Bishop, administrator of the estate of Josephine Szymanski, deceased;
James F. Bishop, administrator of the estate of Herbert Taube, deceased;
James F. Bishop, administrator of the estate of Clara Teichmiller, deceased;
James F. Bishop, administrator of the estate of Anna Tempinski, deceased;
James F. Bishop, administrator of the estate of George Theede, Jr., deceased;
James F. Bishop, administrator of the estate of Agnes Theis, deceased;
James F. Bishop, administrator of the estate of Clara Theis, deceased;
James F. Bishop, administrator of the estate of Emma Thommen, deceased;
James F. Bishop, administrator of the estate of Arthur Tiedemann, deceased;
James F. Bishop, administrator of the estate of Emily Tiedemann, deceased;
James F. Bishop, administrator of the estate of Elizabeth Tismer, deceased;
James F. Bishop, administrator of the estate of Ernest Tismer, deceased;

James F. Bishop, administrator of the estate of Minnie Tismer, deceased;
James F. Bishop, administrator of the estate of George L. Tonnesen, deceased;
James F. Bishop, administrator of the estate of Frank Tranckitella, deceased;
James F. Bishop, administrator of the estate of Herbert Tismer, deceased;
James F. Bishop, administrator of the estate of John Uebel, deceased;
James F. Bishop, administrator of the estate of Anna Urban, deceased;
James F. Bishop, administrator of the estate of Zigmund Urbanowicz, deceased;
James F. Bishop, administrator of the estate of Estelle Decker Valentine, deceased;
James F. Bishop, administrator of the estate of Sylvia Eva Varela, deceased;
James F. Bishop, administrator of the estate of Mary Vlasak, deceased;
James F. Bishop, administrator of the estate of Christian Vogel, deceased;
James F. Bishop, administrator of the estate of Albert Weichbrodt, deceased;
James F. Bishop, administrator of the estate of Lydia Wellestat, deceased;
James F. Bishop, administrator of the estate of Carrie Wesemann, deceased;
James F. Bishop, administrator of the estate of Thomas Wielgos, deceased;
James F. Bishop, administrator of the estate of John E. Wilkinson, deceased;
James F. Bishop, administrator of the estate of Leonard Winski, deceased;
James F. Bishop, administrator of the estate of Eva Wodtke, deceased;

James F. Bishop, administrator of the estate of Harry C. Woller, deceased;

James F. Bishop, administrator of the estate of Catherine E. Wood, deceased;

James F. Bishop, administrator of the estate of George John Wood, Jr., deceased;

James F. Bishop, administrator of the estate of Antonia Zastera, deceased;

James F. Bishop, administrator of the estate of Julia Zastera, deceased;

James F. Bishop, administrator of the estate of Mary Zastera, deceased;

James F. Bishop, administrator of the estate of Alma Zielske, deceased;

James F. Bishop, administrator of the estate of Josephine Zimna, deceased;

James F. Bishop, administrator of the estate of Clemens Zuchmowski, deceased;

Rosie Albertz, administratrix of the estate of Mary Albertz, deceased;

Richard Clarke, administrator of the estate of Robert L. Clarke, deceased;

Harry Evenhouse, administrator of the estate of Annie Evenhouse, deceased;

Harry Evenhouse, administrator of the estate of Jennie Evenhouse, deceased;

Anton Forst, administrator of the estate of Emma Marie Forst, deceased;

Samuel Ginsberg, administrator of the estate of Philip L. Ginsberg, deceased;

George L. Farmer, administrator of the estate of John Ralph Holcombe, deceased;

Maud P. Boyes, administratrix of the estate of Paul Jahnke, deceased;

Lillian S. Schmalz, administratrix *de bonis non* of the estate of Nels Peter Johnson, deceased;

Raymond Appelt, administrator of the estate of Leo Lewicki, deceased;

Mary Murphy, administratrix of the estate of David M. Murphy, deceased;

John A. Fitzgerald, administrator of the estate of Mary Murphy, deceased;

Wilhelm Schoenholz, administrator of the estate of Adolphina Schoenholz, deceased;

Anton Schultz, administrator of the estate of John Schultz, deceased;

Martha Mundt, administratrix of the estate of Catherine Trogg, deceased;

Martha Mundt, administratrix of the estate of Charles Trogg, deceased;

Robert J. Mandl, administrator of the estate of Emil T. Zak, deceased;

Lillian M. Budner, Mae Gehrke, William M. Gourlay, Kate Lyons, Mary Lyons, by Kate Lyons, as next friend; Winifred Lyons, by Kate Lyons, as next friend; John Marley, Bertha Neumann, Bessie O'Brien, Edmund K. Plamondon, Irene C. Plamondon, Marie C. Plamondon, Nora Purcell, Emil Rupp, and Joseph Schultz,

by their proctor, Harry W. Standige, and move the court for leave to file instanter a return to the rule heretofore entered to show cause why the prayer of the petition for a writ of prohibition should not be granted herein, and brief in support of such return, because of said parties' interest in the result, or as friends of the court, said parties being the parties whose proceedings petitioner seeks to have prohibited by the writ prayed for herein.

HARRY W. STANDIDGE,
Proctor for said Parties Above Named.

Received copy of above motion this 11 day of January, A. D. 1917.

C. E. KREMER,
RUSSELL MOTT,
Proctors for Petitioner.

[Endorsed:] Supreme Court U. S., October Term, 1916. Term No. 25, Original. *Ex parte:* In the matter of the Indiana Transportation Co., petitioner. Notice of motion of certain parties for leave to file return to rule to show cause, and proof of service of same. Filed January 15, 1917.

No. 25.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR WRIT OF PROHIBITION. } Original.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

HARRY W. STANDIDGE,
PROCTOR FOR RESPONDENTS.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1916.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR WRIT OF PROHIBITION. } Original.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

Petitioner in its reply brief cites authorities holding that where a party in apt time and in a proper manner specially objects to lack of, or irregularity in, service upon it, and the court overrules such specific objection, said party may then plead to the merits without waiving such specific objection.

Petitioner in the original exceptions filed by it did not make any such objection, the order of the court was that petitioner's exceptions "to joinder" be overruled, and petitioner in its subsequent exceptions stated that it did not waive its exceptions to the alleged "misjoinder" of libelants, and further alleged that said amended libel did not state facts and circumstances which made out a cause of action against it. (Return 19-21.)

Petitioner therefore entered its appearance to the

amended libel without service of process thereunder upon it.

Petitioner contends in its brief (18) that "there is nothing in admiralty law which can give a court jurisdiction in a case of this character without personal service," (See, to the contrary, authorities cited on pages 15-19 respondents' original brief) and adds:

> "It is admitted that it is not unusual to join a number of libelants in admiralty, but that, in no way obviates the necessity of having the defendant before the court."

Petitioner then cites a number of authorities holding that it is proper to join libelants, and no authority to the contrary.

Petitioner's second contention that it has been denied a jury trial by the joinder of libelants is without force, particularly for the reason that it has not demanded a jury trial, and may never do so.

Furthermore a party should not be able to make the administration of justice impossible by demanding a jury trial (See respondents' original brief, 13, 24-25), and when a court exercises its discretion in such a way as to make the administration of justice both practical and possible, as it is its duty to do (See respondents' original brief, 6-15), undoubtedly it is not the law, as petitioner apparently contends, that after the statute of limitations may have effect, parties will be prohibited from further prosecuting their proceedings in court.

Respectfully submitted,

HARRY W. STANDIDGE,
Proctor for Respondents.

SUBJECT INDEX.

Table of Cases.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1916.

No. 25.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR WRIT OF PROHIBITION.	Original.

BRIEF IN SUPPORT OF RETURN OF RESPONDENTS.

STATEMENT.

Petitioner on page 3 of its petition alleges that at the time of the amending of the libel in the cause in question petitioner was a non-resident of, and not doing business in, Illinois, and therefore was not subject to service upon it by process of the District Court of the United States for the Northern District of Illinois. On pages 2 and 3 of its brief it states the above and also says that it is not doing business within said district, or anywhere in the State of Illinois, and that it has no property within said district, and then further states its conclusion of law that it was not, at the time of the filing of said amended libel, nor at any subsequent time, subject to service within said district. Such statements are improper and should be disregarded. Said matters were not shown in the lower court, and statements on which said conclusions of law are based, if true, do not show that service upon petitioner, if required, could not be had in said district.

POINTS AND AUTHORITIES.

I.

THE PETITION SHOWS ON ITS FACE THAT PETITIONER IS NOT ENTITLED TO THE RELIEF PRAYED FOR THEREIN.

32 Cyc. of Law and Procedure, pp. 602.3.
Id., pp. 625-6.
1 Cyc. of Law and Procedure, p. 851.
The Anchoria, 9 Fed. 840.
Jacobsen et al. v. *Navigation Co.*, 93 Fed. 975.
Oliver et al. v. *Alexander et al.*, 31 U. S. 143.
Rich et al. v. *Lambert et al.*, 53 U. S. 347, 352.
Fretz et al. v. *Bull et al.*, 53 U. S. 468.
Admiralty Rule 46, 210 U. S. 558.
The Clan Graham, 153 Fed. 977.
The Samson, 197 Fed. 1017.
4 Fed. Stat., pp. 561-2 (note).
Secs. 913, 918, 921, Judiciary Act.
4 Fed. Stat., p. 561, *et seq.*
Salmon Falls Mnfg. Co. v. *Tangier*, 3 Ware (U. S.) 110.
The Alert, 40 Fed. Rep. 836.
In re N. Y., etc., S. S. Co., Pet'r, 155 U. S. 523.
The Epsilon, 6 Ben. 378, 389.
Sec. 19, Article II, Constitution of Illinois.
Barnes v. *Western Union Tel. Co.*, 120 Fed. 550.
In re N. Y., etc., S. S. Co., Pet'r, *supra.*
The Hudson, 15 Fed. Rep. 162.
The Alert, *supra.*
Ex parte Gordon, 104 U. S. 515.
2 Ency. Pl. & Pr., p. 644.
Id., p. 635.
4 Corpus Juris, pp. 1337-8.

Atkins v. *Disintegrating Co.*, 85 U. S. 272, 298.
Knox et al. v. *Summers et al.*, 7 U. S. 495.
Pollard et al. v. *Dwight et al.*, 8 U. S. 421, 427.
Platt v. *Manning*, 34 Fed. 817, 818.
Lowry et al. v. *Tile M. & G. Ass'n of Cal.*, 98 Fed. 817.
Ry Co. v. *McBride*, 141 U. S. 127, 130.
Barnes v. *Western Union Tel. Co.*, 120 Fed. 550, 554.
Romaine v. *Ins. Co.*, (C. C.) 28 Fed. 625.
Ex parte Eason, 95 U. S. 68, 77.
In re Louisville Underwriters, 134 U. S. 488.
Atkins v. *Disintegrating Co., supra.*
Central Trust Co. v. *McGeorge*, 151 U. S. 129.
Western L. & S. Co. v. *B. B. Cons. M. Co.*, 210 U. S. 368.
Ins. Co. v. *Hillmon*, 145 U. S. 293.
Butler v. *Courier Citizen*, 127 Fed. 1015.
Am. Tr. & Sav. Bank v. *Zeigler Coal Co.*, 165 Fed. 34, 36.
Am. Window Glass Co. v. *Noe*, 158 Fed. 777.
Denver Tramway Co. v. *Norton*, 141 Fed. 599.
Stone v. *United States*, 64 Fed. 667, 672.
Salmon Falls Mnfg. Co. v. *Tangier et al.*, 21 Fed. Cas. 266.

II.

PETITIONER IS NOT ENTITLED TO THE RELIEF WHICH IT PRAYS FOR, BY REASON OF EXCEPTIONS FILED BY IT TO SAID AMENDED LIBEL WHICH IT HAS FAILED TO SET FORTH IN ITS PETITION.

Lowry et al. v. *Tile M. G. Ass'n of Cal. et al.*, 98 Fed. 817.
Barnes v. *Western Union Tel. Co.*, 120 Fed. 550.

ARGUMENT.

I.

THE PETITION SHOWS ON ITS FACE THAT PETITIONER IS NOT ENTITLED TO THE RELIEF PRAYED FOR THEREIN.

> "A writ of prohibition will lie only in cases of manifest necessity, and after a fruitless application for relief to the inferior tribunals. It is properly issued only in cases of extreme necessity. It will not be granted where a greater injustice would be done by its issue than would be prevented by its operation, or where the legal right is doubtful and the remedy would involve public inconvenience."
>
> 32 Cyc. of Law and Procedure, pp. 602-3.
>
> "The petition for the writ of prohibition must show unequivocally every fact requisite to justify the issuance. * * *
>
> "The petition * * * must allege * * * that petitioner * * * either has not consented to the jurisdiction or has objected to it in the lower court."
>
> *Id.*, pp. 625-6.

The above and various other authorities cited herein show that if a party desires to object to alleged irregularity in or lack of proper service of process upon it, such party must do so at the first opportunity, and if, without raising such objection, it pleads otherwise, it will not be entitled to a writ of prohibition in this court on a petition showing that it did not properly raise any such objection in the lower court, and this rule cannot be changed because, as in the case at bar, such party in its petition (see page 3 of petition herein) improperly alleges its own conclusions that at the time it might have raised

such objection in the lower court such service could not have been had upon it, nor because it also improperly alleges in the statement in its brief (see pages 2-3 of petitioner's brief herein), its further conclusions that up to the time of the filing of its petition such service could not have been had upon it.

For these and other reasons, it is manifest that the petition herein shows on its face that petitioner is not entitled to the relief prayed for therein.

In the District Court, in the cause in question, as shown by said petition, petitioner was served with a citation under the original libel, and without raising any objection whatever that it had not again been served with a citation under the amended libel, pleaded to said amended libel by filing exceptions thereto alleging that the same was insufficient because 373 additional libelants were improperly joined with the original libelant therein, which exceptions constituted a general appearance on the part of petitioner, being entitled in said cause and signed by petitioner, by its proctor, Mr. Charles E. Kremer, who is also proctor for petitioner herein, and being otherwise as follows:

> "And now comes the Indiana Transportation Company, one of the respondents above named, and excepts to the amended libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, in the following particulars:
>
> 1st. That the said amended libel is informal, contrary to the admiralty rules and procedure and contrary to law because it joins with the original libelant 373 additional libelants who have a separate and distinct cause of action from that of the original libelant and are therefore improperly joined.
>
> 2d. Because the above named respondent cannot in law in this case be called upon to answer

the said amended libel as to 373 additional libelants.

3d. In all of which particulars the said amended libel is imperfect and insufficient and that the said respondent is not bound to answer the same as to the 373 additional libelants improperly joined to the original libel."

In this court, however, petitioner, contrary to its contentions in said exceptions in the court below, on page 18 of its brief filed in support of its petition herein, states that "It is admitted that it is not unusual to join a number of libelants in admiralty," and it then cites a number of authorities which lay down the rule that it is proper to join them, yet it asks a writ of prohibition on the ground that it was not served with a citation under said amended libel, which point, however, it states on page 19 of its said brief, it believes was never before raised in any case, and which, as shown by its said petition, was not properly raised by it in the lower court.

In addition to the authorities cited by petitioner to the effect that in admiralty it is proper to join in one proceeding all libelants having like causes of action, the following authorities also lay down the same rule:

In 1 Cyc. of Law and Procedure, p. 851, it is said:

"Joinder of libelants. Parties whose interests or claims are based upon a cause of action common to all, though separate and distinct as between themselves, may unite as libelants, whether the claims arise out of contract or tort."

In the case of The Anchoria, 9 Fed. 840, the court says:

"All persons entitled on the same state of facts to participate in the same relief may join as libelants."

In *Jacobsen et al.* v. *Nav. Co.*, 93 Fed. 975, cited by petitioner in its brief, a libel *in personam* was filed by one Jacobsen, who sued for loss of his vessel and other property and for personal injuries. Two other parties joined in the libel, one as administrator of a deceased person who was on board of the vessel and who was drowned, and the other party sued for damages for alleged personal injuries and lost personal property. The court, on page 976, says:

> "The rule as to the question of misjoinder is that all parties in admiralty suits may join as libelants whose interests rest upon a cause of action common to all, though as between themselves, their interests are separate and distinct, * * * and this rule applies both in suits *in personam* and *in rem;* * * * in this case, the cause of action being common to all the parties, it is sufficient; it is not material that the interests of the parties are distinct."

In *Oliver et al.* v. *Alexander et al.*, 31 U. S. 143, a libel was filed by one libelant against a ship to recover wages. By subsequent amended libels, 77 other parties having like claims were added as libelants. The court stated (p. 145) that such claimants could not sue in a joint action at common law, and added:

> "But a different course of practice has prevailed for ages, in the court of admiralty, in regard to suits for seamen's wages."

The court further stated that such practice was a privilege confined strictly to demands for wages, which statement, however, was *obiter dictum*, and is not in accord with later decisions of the courts and the authorities herein cited.

The court also says that the reason for the privilege of consolidation is "to save the parties from

oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament."

The decision does not show whether or not a new citation was issued on the filing of each amended libel adding additional parties libelant.

The principal purposes of the joinder and consolidation rule in admiralty being, however, to save parties from oppressive costs and expenses and enable speedy justice to be administered to all who stand in a similar predicament, as held in said Oliver case, *supra,* and various other cases, it would seem that such additional service was unnecessary and contrary to the spirit of said rule, and clearly such additional service is not required where a party, without such service, and without objecting to the lack thereof, voluntarily enters its appearance, as petitioner did in the case at bar.

In *Rich et al.* v. *Lambert et al.,* 53 U. S. 347, 352, the court said:

> "In cases where the several claims against a ship are founded upon a common injury and loss, the questions involved depending upon the same general rules of law, and the same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted.
>
> The defense will usually be the same in all cases; but, if otherwise, the parties will not be prejudiced, as they may avail themselves in their answers of any defense existing against either of the several owners. For, although the proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common in-

> jury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action. The same decree, also, is entered as in the case of separate suits."

In *Fretz et al.* v. *Bull et al.,* 53 U. S. 468, the court says:

> "But all persons entitled on the same state of facts to participate in the same relief may join as libelants, whether the suit be *in personam* or *in rem.*"

Under admiralty rule 46, in cases not expressly provided for, courts may regulate their practice in such manner as they deem most expedient for the due administration of justice, and under said rule even actions *in rem* and *in personam* may be joined, as held in the cases of The Clan Graham, 153 Fed. 977, and The Samson, 197 Fed. 1017, and other cases.

Said rule 46 (210 U. S. 558) provides as follows:

> "In all cases not provided for by the foregoing rules the District and Circuit Courts are to regulate the practice of the said courts, respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty."

The United States statutes also provide for the consolidation in admiralty of causes of a like nature, and confer on the District Court power to make rules which will best subserve the interests of justice.

In note referring to Sec. 913 of the Judiciary Act, pp. 561-2, Vol. 4, Fed. Stat., it is said:

> "Powers as ample as legislation can give are conferred by this section and Section 918, R. S., *infra,* in cases of admiralty and maritime jurisdiction as to the forms and modes of proceeding, and such alterations or additions thereto as the said courts shall in their discretion deem expedi-

> ent, and 'to regulate the practice as shall be deemed fit and necessary for the advancement of justice, subject only to any existing provisions of law or the rules established by the Supreme Court.' "

Section 921 of said Judiciary Act provides for consolidation of causes of a like nature or relative to the same question, and in *Salmon Falls Mnfg. Co.* v. *Tangier,* 3 Ware (U. S.) 110, it is said that in admiralty proceedings said Section 921 is merely an affirmance of pre-existing law.

It would therefore seem unreasonable to say that the 373 causes of action of libelants, in the case at bar, instead of being joined, as they were, in said amended libel, should first have been brought separately, and then consolidated later under the provisions of said statute.

The power, and also the duty, of the District Courts, as courts of original jurisdiction in admiralty, to so regulate their practice as to avoid a multiplicity of suits, and to secure uniformity of procedure for, and equal justice to, all parties having like causes of action—and the larger the number of such parties, as, for example, the number in the case at bar, the greater the opportunity for inequality of results if there should not be such uniformity of procedure, is well stated in the case of The Alert, 40 Fed. Rep. 836, wherein complaint was made by one of the parties that it was brought into the proceeding by improper process, and the opinion of the District Court holding to the contrary therein, was said by this court, in *In re* N. Y., etc., Steamship Co., Pet'r, 155 U. S. 523, to be "an able and exhaustive discussion on the question involved."

The District Court said that the propriety of its holding in the matter did not depend upon the form of the action, whether it be in contract or in tort, but on the essential reasons for it, viz., the due administration of justice; to prevent circuity of action and a multiplicity of suits upon the same question; to secure a thorough hearing upon full evidence as to to the facts; to prevent diverse or contradictory decisions upon the same subject, involving, necessarily, injustice to some of the parties. And said court further stated (pp. 838-9):

> "Both the statutes and the admiralty court rules, in cases not provided for, authorize the court 'to regulate its practice as is fit and necessary for the advancement of justice.' Rev. St., Secs. 913, 918, rule 46; The Hudson, 15 Fed. Rep. 175. This authority is a power held in trust for the benefit of litigants, and it is the duty of the court to exercise it in proper cases, by adapting its procedure to the practical needs of justice. On this point BENEDICT, J., in the case of The Epsilon, 6 Ben. 378, 389, says:
>
> 'The admiralty creates its own forms of proceeding, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the admiralty. "The principles, rules and usages which belong to courts of admiralty" (Process Act 1792) enable these courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other courts, and for many of which it were vain to look in any statute. Stripped of the power to pursue these methods, there would be little left to distinguish a court of admiralty from a court of equity or of law. * * * When cases arise which have not been provided for in the rules prescribed by the Supreme Court, the District Courts, as the only courts of original jurisdic-

> tion in admiralty, have the power and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer.' "

Section 2 of the syllabus in the above case, in addition to instructively characterizing the language of the court therein, also seems in itself to state in apt terms a rule applicable to the case at bar, as follows:

> "It is the duty of courts of admiralty, under their inherent and statutory powers, to adapt their practice and proceedings to new emergencies, so as to secure, as far as possible, the speedy, complete and convenient administration of justice."

It seems clear that it is the duty of courts of admiralty to so regulate their practice and proceedings and to so adapt the same to new emergencies that when an unusually large number of persons, such as in the case at bar, have like causes of action, justice will not be denied to many, and perhaps most, of such persons, because the machinery of the courts is not sufficient to grant a separate trial upon the claim of each of a great portion of them, within their probable lifetimes, and in any event, within at least not less than a period of many years to come.

And particularly is this true where, as in the case at bar, nearly all of said causes of action are for alleged wrongful deaths, existing under the statutes of the State of Illinois, and in Section 19 of the Bill of Rights set forth in Article II of the Constitution of said state, it is provided as follows:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to pur-

> chase it, completely and without denial, promptly, and without delay."

It is reasonable to believe that at least two weeks would be required for a separate trial on any one of the claims of the 373 libelants named in the amended libel in the case at bar (there being 12 defendants, such a trial it is probable would last considerably longer), and on the basis of two weeks for each trial, the 373 cases would require continuous trials for more than 15 years.

In *Barnes* v. *Western Union Telegraph Co.*, 120 Fed. 550, in denying the application of the defendant therein to withdraw his demurrer and answer and plead irregularity of service, the court said that the granting of such application "could only serve to delay the trial of the case on the merits," and that "This it is the duty of the court to avoid." And the court added:

> "Indeed, it is ever the duty of the court, entrusted with the administration of justice between contending parties, to exercise its discretion and all of its ascertained powers to bring the parties to have the cause speedily determined on its merits."

In the case at bar, petitioner, by its application for a writ of prohibition, is not alone seeking for delay; it is also seeking to avoid answering unto libelants for the wrong which it is alleged to have done; and on its dilatory objection that it was not served with a citation under said amended libel, it prays a writ of prohibition prohibiting the court from proceeding with the hearing of any of the claims of said additional libelants; and it does not pray such prohibition until it shall have been, as it claims it had a right to be, served with a citation under said amended

libel; it prays such prohibition without any limitation or qualification whatsoever.

In *In re* N. Y., etc., Steamship Co., Pet'r, 155 U. S. 523, the court denied a writ of prohibition which was prayed for on the ground that the court had no jurisdiction in a cause originally brought *in rem* against a vessel, to allow petitioner, as charterer of the vessel, to be joined later in the same cause in a proceeding *in personam*, petitioner having appeared "specially for the purpose of objecting to the jurisdiction of the court," and the court having overruled peitioner's objections in that regard, and the Supreme Court held that if the lower court erred in so ruling, such error might be corrected on appeal.

The Supreme Court in denying the application for said writ of prohibition, cited the cases of The Hudson, 15 Fed. Reports 162, and The Alert, 40 Fed. Reports 836, and stated that in the case of The Hudson it was held that where several vessels are alleged to be in fault in causing a collision, in a libel brought by a party to recover damages sustained by reason thereof, all the vessels should be proceeded against as defendants to avoid multiplicity of suits, and to enable damages to be properly apportioned, and that if libelant proceeded against one vessel only, it was competent for the District Court to award its further process in the cause, upon petition of the owner of the vessel sued, for the arrest of the other vessels to answer for their share of the damage, and added:

> "The question of the right to pursue this course was discussed at large by the learned judge and the conclusion reached that it was competent for the District Court in cases not provided for by the rules in admiralty of this court to regulate its own practice and to allow

> remedies according to the analogies of admiralty procedure as new exigencies arose, which the court might deem necessary for the due administration of justice; and that it was essential and expedient in collision cases in admiralty that the liability of all persons or vessels involved should be determined in a single action rather than in successive independent suits."

In *Ex Parte* Gordon, 104 U. S. 515, the court denied a writ of prohibition to prevent the District Court of Maryland, sitting in admiralty, from proceeding further in a cause begun in that court against a vessel to recover damages for the drowning of certain persons, by reason of a collision between said vessel and another steamer.

Petitioner in the case at bar, although admitting, as stated, that "it is not unusual to join a number of libelants in admiralty," further states on page 18 of its brief that "There is nothing in admiralty law which can give a court jurisdiction in a case of this character without personal service."

Petitioner seems to have overlooked the following authorities:

In 2 Encyclopaedia of Pleading and Practice, p. 644, it is said:

> "Waives Process.—The object of a summons or process is to put the defendant upon notice of the demand against him, and to bring him into court at the time therein specified. If the defendant makes a general appearance, then the issuing and service of process is not jurisdictional and it is waived. The court can thereafter proceed and grant any relief to which the plaintiff is entitled."

And on page 635 the author also states:

> "Any challenging the sufficiency of a pleading is a general appearance; by interposing a de-

murrer to the complaint or declaration the defendant makes full appearance in the action."

Also, in 4 Corpus Juris, pp. 1337-8, it is said:

> "The filing of a demurrer, unless based solely on the ground of lack of jurisdiction of the person, constitutes a general appearance, whether it is filed to plaintiff's original pleading or to an amended or substituted pleading."

In *Atkins* v. *The Disintegrating Company*, 85 U. S., pp. 272, 298, the court said that "The defendants entered their appearance without reservation," and added:

> "This made their position just what it would have been if they had been brought in regularly by the service of process. In this aspect of the case all defects were cured and the jurisdiction of the court over their persons became complete. This warranted the decree *in personam* for the amount adjudged to the libelants."

In *Knox et al.* v. *Summers et al.*, 7 U. S. 495, it was held that an appearance of defendant by an attorney cures all antecedent irregularity of process, the court saying (p. 498):

> "The court was unanimously of opinion that the appearances by attorney cured all irregularity of process. The defendant, perhaps, might have appeared *in propria persona*, and directly pleaded in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity."

In *Pollard et al.* v. *Dwight et al.*, 8 U. S. 421, 427, the court said:

> "The point of jurisdiction made by the plaintiffs in error is considered free from all doubt. By appearing to the action the defendants in the court placed themselves precisely in the situation in which they would have stood had process been served upon them, and consequently,

waived all objections to the non-service of process."

In *Platt* v. *Manning*, 34 Fed. 817, 818, it is said:

> "The office of a summons is to bring the defendant into court. He may come in voluntarily if he chooses, and, having done so, and having pleaded to the merits, he is not at liberty to dispute the jurisdiction of the court because not regularly served with process."

In *Lowry et al.* v. *Tile M. & G. Association of California*, 98 Fed. 817, it was held that a demurrer raising questions as to jurisdiction and also as to sufficiency of complaint, constituted a general appearance and waives the question of jurisdiction, the court citing various authorities, and saying:

> "The appearance of defendants demurring in this action must, in view of these authorities, be regarded as a general appearance, and they are therefore prevented from objecting that their co-defendants are improperly joined with them on the ground that they are being sued in the wrong district."

And among other cases the court cites the case of *Ry. Co.* v. *McBride*, 141 U. S. 127, 130, to the same effect.

In *Barnes* v. *Western Union Telegraph Co.*, 120 Fed. 550, 554, the court stated that the defendant could make its defense as perfectly on irregular service of summons as if regularly served, and added:

> "The court therefore will not impose upon the plaintiff the unnecessary delay and expense of a further service, or the possibility of a denial of the hearing on the merits, because of this inadvertence, if in the light of the authorities this can be avoided."

The court cites the case of *Knox et al.* v. *Summers et al.*, 7 U. S. 495, above quoted herein, as a con-

trolling authority and says that the rule laid down therein applies, notwithstanding the fact that in a motion made by the defendant to dismiss, the defendant stated that it appeared at the first term of the court, " 'not for the purpose of submitting to the jurisdiction thereof, but to protest that the court has no jurisdiction in said cause, and moves to dismiss plaintiff's petition on the ground that it appears on its face that the court has no jurisdiction of the alleged cause of action or of this defendant in said cause; second and third, that there was no legal process, it being directed to the marshal and served by the deputy,' etc.," and the court adds:

> "The special appearance, therefore, seems to relate exclusively to its denial of jurisdiction, and not to the alleged irregularity of service. It is nowhere stated that the appearance is to object that the service was irregular or invalid. A denial of jurisdiction of the subject of the action or of the person of the defendant is a ground of defense wholly distinct from that of an irregular service. The special appearance by demurrer is therefore limited to the special apeparance as set forth in the motion to dismiss, as we have seen, this is a special appearance solely for the purpose of protesting against the jurisdiction of the court."

This language appears applicable in the case at bar, petitioner having nowhere stated, in the exceptions filed by it to said amended libel that it appeared for the purpose of objecting that service of citation had not been had upon it under said amended libel, and the allegations in said exceptions that said amended libel improperly joined the libelants named therein, and was insufficient by reason thereof, was a ground of defense wholly distinct from that of such lack of service upon it under said amended libel.

The court in the Barnes case, *supra*, further says that it has been held that "where an objection is made to the irregularity of service, in order to avoid a waiver thereof, the proper practice is to obtain an order of the court for leave to make a special appearance," and in support of such statement the court cites the case of *Romaine* v. *Insurance Company*, (C. C.) 28 Fed. 625.

The statements in the sixth paragraph, on page 3 of the petition, that at the time of the amending of the libel in said cause petitioner was a foreign corporation and non-resident of the State of Illinois, and not doing business in said state, and other statements in that regard appearing in the brief, are improperly set forth therein and should be disregarded by the court, for the reason that, as shown by said petition, no such showing was made in the lower court, and as stated in the case of *Ex Parte* Eason, 95 U. S. 68, 77, the question whether or not a court has transcended its jurisdiction "must depend not upon the facts stated *de hors* the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment."

Furthermore, in the case of *In re* The Louisville Underwriters, 134 U. S. 488, the court denied a writ of prohibition, holding that the provisions of the act of March 3, 1887, that "no civil suit" shall be brought before a Circuit or District Court against any person in any other district than that of which he is an inhabitant, does not apply to cases in admiralty.

In admiralty, also, a party may be served with

process wherever such party may be found, and if such party cannot be found, service may be had through attachment of its property.

Atkins v. *The Disintegrating Co.*, 85 U. S. 272.

The question of jurisdiction may be waived also, even if neither plaintiff nor defendant resides in the district in which the suit is brought.

Central Trust Co. v. *McGeorge*, 151 U. S. 129.

Western L. & S. Co. v. *B. B. Cons. Min. Co.*, 210 U. S. 368.

The statement on page 3 of said petition, that "no process was prayed for or issued under said amended libel," also should be disregarded, because the petition herein does not contain a copy of the prayer of said amended libel, and further because said amended libel prays the issuance of due process against all respondents, including petitioner, and a citation was issued against all respondents who were not parties to, and who were not served with a citation under the original libel, as shown by the return herein.

If petitioner had been entitled to be served with a citation under said amended libel, and had insisted upon being so served, before pleading thereto, such service might have been had upon it. Having pleaded to said amended libel, however, without objecting that it had not been so served, and without insisting upon such service, before pleading thereto, it waived its right, if any it had, to such service, and having waived such right, if such right it had, in the lower court, it should not now have a writ of prohibition from this court for the restoration thereof.

Petitioner contends on page 25, *et seq.*, of its brief, that the court had no jurisdiction to join all the libelants in one suit because each party is entitled to a jury trial, and that such joinder operates to deprive petitioner of its right to a jury trial.

Petitioner, as shown by said petition, *has not demanded a jury trial,* and a court in considering the question of whether or not a writ of prohibition should be granted, will take the record as it finds it and will not speculate as to what it might have done if the party applying for such writ had taken some action which it did not take in the lower court.

In *Insurance Co.* v. *Hillmon,* 145 U. S. 293, it was said that "although defendants may lawfully be compelled, at discretion of court, to try cases together, the causes of action remain distinct, and require separate verdicts and judgments, and no defendant can be deprived without its consent of any right material to its defense, whether by way of challenge to jurors or of objections to evidence which such defendant would be entitled to on separate trial.

In *Butler* v. *Courier Citizen,* 127 Fed. 1015, it was held that actions for libel may be tried together, although questions as to damages differ.

In *Am. Tr. & Sav. Bank* v. *Zeigler Coal Co.,* 165 Fed. 34, 36, the court says:

> "The method of trial so adopted, with the two cases treated as separate causes of action, requiring separate verdicts and judgments, conforms to the purposes of the statute referred to, as upheld in *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706, and recognized in *American Window Glass Co.* v. *Noe* (decided by this court during the current term), 158 Fed. 777; 86 C. C. A. 133."

In the case of *American Window Glass Co.* v. *Noe,*

158 Fed. 777, cited *supra* in an opinion by Judge BAKER, sitting with Judges SEAMAN and KOHLSAAT, of the Circuit Court of Appeals of the Seventh Circuit, it is said:

> "Section 921, Rev. St. (U. S. Comp. St. 1901, p. 685), authorizes the consolidation of cases for the purpose of trial 'when it appears reasonable to do so.' The ground of plaintiff's motion was that he and the other plaintiff were injured in the same accident, and that the same evidence, except as to the extent of the injuries, was determinative of both cases. The only stated reason of defendant's opposition was the disparity between the injuries, the other plaintiff being comparatively unhurt, while this plaintiff was rendered utterly and forever helpless. Undoubtedly the condition of this plaintiff made a very strong appeal to the sympathies of the jury; but the record contains nothing that affords a basis for concluding that the verdict was other than it would have been if this case had been tried alone. The possibility, or our conjecture, that a separate trial might have resulted differently, is no warrant for holding that the trial judge in sustaining the motion abused the discretion that is lodged in him by the statute. If ever this discretion may fitly be exercised in sustaining a contested motion of this character, it would seem to be when the parties agree that all question except as to the amounts of the claims are covered by the same evidence. *Denver Tramway Co.* v. *Norton*, 141 Fed. 599, 73 C. C. A. 1; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706."

In *Denver Tramway Co.* v. *Norton*, 141 Fed. 599, above cited, the court said:

> "Complaint is made of the action of the court in directing a consolidation of the two cases for trial. The two actions grew out of the same accident, with the same defenses, and defended on the same evidence. The only difference be-

ing in the matter of damages dependent upon the extent of the injury sustained by the respective plaintiffs. Such a consolidation was clearly within the judicial discretion reposed in the court by Section 921, Rev. St. U. S. (U. S. Comp. St. 1901, p. 685).

In *Stone* v. *United States*, 64 Fed. 667, the government brought an action to recover the value of certain timber cut and removed from public lands, and such action was consolidated and tried with another similar case. The court said (p. 672):

> "The two cases were consolidated. The authority of the court to order them to be tried together is not denied. The right to do this when the cases involve substantially the same issues, and delay and expense would thereby be avoided, is unquestioned. *Insurance Co.* v. *Hillmon*, 145 U. S. 293, 12 Sup. Ct. 909, and authorities there cited."

In *Salmon Falls Mnfg. Co.* v. *The Tangier, Goddard et al.* v. *Same, and Pearson* v. *Same*, case No. 12,267, 21 Fed. Cas. 266, the court said:

> "Before proceeding to examine these cases on their merits, it may not be improper to observe that some time and some expense would have been saved if these three libels had been united in one; or if, before hearing the first, the three had been consolidated and heard together. They all involve one or more questions as to the liability of the vessel for the loss of the cotton under circumstances common to all. Such a joinder of parties, where several persons have causes of action of a like nature, and involving one or more questions common to all, is authorized by the general principles of admiralty practice. It has from time immemorial been the familiar usage in the case of seamen suing for their wages. But it is a right which extends to all parties in analogous cases. The Supreme Court has held that it extends to several con-

> signees suing for damages sustained by their goods from the unseaworthiness of the vessel or the fault of the master. *Rich* v. *Lambert*, 12 How. (53 U. S.) 353. And I have supposed that it embraced suits by material men, where the liability of the vessel is a question involved. Such joinder is not only authorized by the general principles of admiralty practice, but is specially enjoined by the process act of July 22, 1813 (3 Stat., p. 19, Sec. 3). The act, so far as it applies to proceedings in the admiralty, I understand to be merely in affirmance of the pre-existing law of the court. In such cases of joinder or consolidation, all the evidence touching the questions common to all the cases, is taken but once, and when these questions are decided, the cases become separate and distinct, and each party litigates his own on its own peculiar merits."

Courts throughout the country instruct juries that they shall not consider the question of damages until they have determined the question of liability.

In the case at bar the question of liability as to all libelants and respondents, including petitioner, should be determined but once, and if a jury should be demanded, and its determination of the question of liability would entitle libelants to damages, as the authorities hold that when cases are tried together there must be separate verdicts and decrees, a jury could render its verdict as to damages immediately after hearing the evidence as to the loss, if any, sustained by each libelant.

Separate jury trials would be practically impossible on account of the time required, and there might be such lack of uniformity of result as to bring the law into disfavor.

Therefore, if a jury trial should be demanded in

the case at bar, the procedure above suggested for such a trial seems practical and proper, and if it is not, the court should devise some procedure that would be.

As stated, however, petitioner has not demanded a jury trial, and is not entitled to have this court hold that it has been deprived of something which it has not asked for.

II.

PETITIONER IS NOT ENTITLED TO THE RELIEF WHICH IT PRAYS FOR, BY REASON OF EXCEPTIONS FILED BY IT TO SAID AMENDED LIBEL WHICH IT HAS FAILED TO SET FORTH IN SAID PETITION.

After the court on September 18, 1916, had overruled the original exceptions filed by petitioner to said amended libel and had ordered petitioner to plead thereto within 20 days thereafter, petitioner, within said period of 20 days, and on October 7, 1916, and before the filing of its petition herein, filed additional exceptions to said amended libel entitled in said cause, and being otherwise as follows:

> "And now comes the Indiana Transportation Company, one of the respondents above named, and excepts to the amended libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, and others, as follows:
>
> This respondent does not hereby waive its exceptions heretofore filed in relation to the misjoinder of 373 additional libels and its right, and insists that this court has not jurisdiction of the respondent of so much of the said amended libel as sets up the claims of the 373 additional libelants, joined with the original libel, and it therefore insists upon its right to further object to the joining of said 373 additional libelants, and further because said amended libel does not state

facts and circumstances which make out a cause of action against this respondent, in all of which particulars the said amended libel is imperfect and insufficient, and that the said respondent is not bound to answer the same.

INDIANA TRANSPORTATION COMPANY,
By C. E. KREMER,
Its Proctor.

C. E. KREMER,
Proctor for the Indiana Transportation Company."

Petitioner in said additional exceptions, as in said original exceptions, makes no complaint whatever that it was not served with a citation under said amended libel. It insists upon its right to further object to the joinder of said additional libelants in said amended libel, and also alleges that said amended libel "does not state facts and circumstances which make out a cause of action against petitioner, and that in all of said particulars said amended libel is imperfect and insufficient," and that "petitioner is not bound to answer same."

In *Lowry et al.* v. *Tile M. G. Ass'n of California et al.*, 98 Fed. 817, certain defendants filed a demurrer raising questions as to jurisdiction, and also as to sufficiency of the complaint. The court said (pp. 822-3):

> "A general appearance, therefore, on the part of the defendants, must be deemed a waiver of the objections to the misjoinder because the other defendants are not inhabitants of this district. Counsel contend that they have not made such a general appearance, but have demurred specially on the ground that certain defendants are improperly joined with them. The terms of the demurrer constitute a sufficient answer to this contention.
>
> The grounds of demurrer are not confined to the jurisdiction of the court, but the merits of

the case are involved in the objection that the complaint does not state facts sufficient to constitute a cause of action. * * *

In the case at bar defendants did not file their demurrer 'for the special and single purpose of objecting to the jurisdiction,' but for the further purpose of attacking the merits of the case upon the facts as stated in the complaint; and this last issue the court is called upon to decide as a material question in controversy, as will appear hereafter. The appearance of defendants demurring in this action must, in view of these authorities, be regarded as a general appearance, and they are therefore prevented from objecting that their co-defendants are improperly joined with them on the ground that they are being sued in the wrong district."

See also *Barnes* v. *Western Union Telegraph Co.*, 120 Fed. 550, in which case the court holds that a party objecting to lack of jurisdiction of the court because of alleged irregularity of service must point out specifically its objection in that regard or be held to have waived such objection if it pleads without so pointing out the same, and the court cites authority that the proper practice is to obtain an order of the court for leave to make a special appearance.

Other authorities above cited also show that both the original and additional exceptions filed by the petitioner to the amended libel constitute a general appearance on the part of petitioner in said cause, and petitioner is not entitled to a writ of prohibition to now place it in a better position by reason of lapse of time, than it would have been in if it had done otherwise than it did do in the lower court.

Wherefore respondents pray that the prayer of the petition herein be denied.

Respectfully submitted,

HARRY W. STANDIDGE,
Proctor for Respondents.

Chicago, December, 1916.

No. 25.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR WRIT OF PROHIBITION. } Original.

RETURN OF RESPONDENTS TO RULE ENTERED TO SHOW CAUSE WHY THE PRAYER OF THE PETITION FOR A WRIT OF PROHIBITION SHOULD NOT BE GRANTED HEREIN.

HARRY W. STANDIDGE,
PROCTOR FOR RESPONDENTS.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1916.

No. 25.

IN THE MATTER OF THE PETITION OF THE INDIANA TRANSPORTATION COMPANY FOR WRIT OF PROHIBITION. } Original.

RETURN OF RESPONDENTS TO RULE ENTERED TO SHOW CAUSE WHY THE PRAYER OF THE PETITION FOR A WRIT OF PROHIBITION SHOULD NOT BE GRANTED HEREIN.

Now come Respondents:

James F. Bishop, Administrator of the Estate of Marie Adamkiewicz, Deceased,
James F. Bishop, Administrator of the Estate of Alfred E. Anderson, Deceased,
James F. Bishop, Administrator of the Estate of Otto E. Anderson, Deceased,
James F. Bishop, Administrator of the Estate of Harold E. Andren, Deceased,
James F. Bishop, Administrator of the Estate of Amily Androvits, Deceased,
James F. Bishop, Administrator of the Estate of Emerenc Androvits, Deceased,
James F. Bishop, Administrator of the Estate of Sunna Androvits, Deceased,

James F. Bishop, Administrator of the Estate of Frances Badalensky, Deceased,
James F. Bishop, Administrator of the Estate of Harry Baia, Deceased,
James F. Bishop, Administrator of the Estate of Morris W. Baldwin, Deceased,
James F. Bishop, Administrator of the Estate of Paul Bannach, Deceased,
James F. Bishop, Administrator of the Estate of Edward S. Bartlett, Deceased,
James F. Bishop, Administrator of the Estate of Margaret Becker, Deceased,
James F. Bishop, Administrator of the Estate of Florence Begitske, Deceased,
James F. Bishop, Administrator of the Estate of Agnes Behrendt, Deceased,
James F. Bishop, Administrator of the Estate of Gertrude Behrendt, Deceased,
James F. Bishop, Administrator of the Estate of William Belmonti, Deceased,
James F. Bishop, Administrator of the Estate of Charles Bender, Deceased,
James F. Bishop, Administrator of the Estate of Samuel Benn, Deceased,
James F. Bishop, Administrator of the Estate of Le Roy D. Bennett, Deceased,
James F. Bishop, Administrator of the Estate of David G. Benson, Deceased,
James F. Bishop, Administrator of the Estate of Myrtle J. Berglund, Deceased,
James F. Bishop, Administrator of the Estate of David A. Bergman, Deceased,
James F. Bishop, Administrator of the Estate of Harry D. Bergquist, Deceased,
James F. Bishop, Administrator of the Estate of Ida May Berlin, Deceased,
James F. Bishop, Administrator of the Estate of Joseph Bertrand, Deceased,
James F. Bishop, Administrator of the Estate of Mathilda Beutelspacher, Deceased,
James F. Bishop, Administrator of the Estate of Frederick Biehl, Deceased,

James F. Bishop, Administrator of the Estate of Frank J. Binkley, Deceased,
James F. Bishop, Administrator of the Estate of Carl Bluch, Deceased,
James F. Bishop, Administrator of the Estate of Matthew J. Bonga, Deceased,
James F. Bishop, Administrator of the Estate of Elizabeth Bosch, Deceased,
James F. Bishop, Administrator of the Estate of Oliver J. Bouffard, Deceased,
James F. Bishop, Administrator of the Estate of Anna Braitsch, Deceased,
James F. Bishop, Administrator of the Estate of Frederick Braitsch, Deceased,
James F. Bishop, Administrator of the Estate of Gertrude Braitsch, Deceased,
James F. Bishop, Administrator of the Estate of Hattie Braitsch, Deceased,
James F. Bishop, Administrator of the Estate of John Braitsch, Deceased,
James F. Bishop, Administrator of the Estate of Marie Braitsch, Deceased,
James F. Bishop, Administrator of the Estate of Thomas F. Brennan, Deceased,
James F. Bishop, Administrator of the Estate of Anna Brenner, Deceased,
James F. Bishop, Administrator of the Estate of Harriet Budner, Deceased,
James F. Bishop, Administrator of the Estate of Arthur Buege, Deceased,
James F. Bishop, Administrator of the Estate of Annie Buth, Deceased,
James F. Bishop, Administrator of the Estate of Thomas J. Carroll, Deceased,
James F. Bishop, Administrator of the Estate of Nellie Casper, Deceased,
James F. Bishop, Administrator of the Estate of Mary Ceranek, Deceased,
James F. Bishop, Administrator of the Estate of Michael Chamberlain, Deceased,
James F. Bishop, Administrator of the Estate of Frieda Christiansen, Deceased,

James F. Bishop, Administrator of the Estate of Marie Eleanor Clarke, Deceased,
James F. Bishop, Administrator of the Estate of Signa Clarke, Deceased,
James F. Bishop, Administrator of the Estate of Celia Colombik, Deceased,
James F. Bishop, Administrator of the Estate of Rose V. Cullen, Deceased,
James F. Bishop, Administrator of the Estate of John Daly, Deceased,
James F. Bishop, Administrator of the Estate of Fred J. Dankers, Deceased,
James F. Bishop, Administrator of the Estate of Martha A. Darkar, Deceased,
James F. Bishop, Administrator of the Estate of Lillian Davis, Deceased,
James F. Bishop, Administrator of the Estate of John Debnar, Deceased,
James F. Bishop, Administrator of the Estate of Caroline M. De Tamble, Deceased,
James F. Bishop, Administrator of the Estate of Paul Dolgner, Deceased,
James F. Bishop, Administrator of the Estate of Charles Doll, Deceased,
James F. Bishop, Administrator of the Estate of Robert Doll, Deceased,
James F. Bishop, Administrator of the Estate of Eleanora Doneske, Deceased,
James F. Bishop, Administrator of the Estate of Florence T. Drury, Deceased,
James F. Bishop, Administrator of the Estate of John Dudek, Deceased,
James F. Bishop, Administrator of the Estate of Mary Dudek, Deceased,
James F. Bishop, Administrator of the Estate of Bessie Dvorak, Deceased,
James F. Bishop, Administrator of the Estate of Minnie Dziondziak, Deceased,
James F. Bishop, Administrator of the Estate of Mary Helen Egan, Deceased,
James F. Bishop, Administrator of the Estate of Nick Elecks (alias Illick), Deceased.

James F. Bishop, Administrator of the Estate of Harry Engenhart, Deceased,
James F. Bishop, Administrator of the Estate of Angela Etzkorn, Deceased,
James F. Bishop, Administrator of the Estate of William Feehan, Deceased,
James F. Bishop, Administrator of the Estate of Dorothy Fitzgerald, Deceased,
James F. Bishop, Administrator of the Estate of Nellie Fitzgerald, Deceased,
James F. Bishop, Administrator of the Estate of Henry Flemming, Deceased,
James F. Bishop, Administrator of the Estate of Emil Flicek, Deceased,
James F. Bishop, Administrator of the Estate of Harry L. Foster, Deceased,
James F. Bishop, Administrator of the Estate of Marie Frackowiak, Deceased.
James F. Bishop, Administrator of the Estate of Alice Frederick, Deceased,
James F. Bishop, Administrator of the Estate of Yadwiga Freilich, Deceased,
James F. Bishop, Administrator of the Estate of Anna Frisina, Deceased,
James F. Bishop, Administrator of the Estate of Philip Frisina, Deceased,
James F. Bishop, Administrator of the Estate of Marie Gabriel, Deceased,
James F. Bishop, Administrator of the Estate of Edward Gatens, Deceased,
James F. Bishop, Administrator of the Estate of Wladyslaw Gecewicz, Deceased,
James F. Bishop, Administrator of the Estate of Emily Genda (Alias Gonda), Deceased,
James F. Bishop, Administrator of the Estate of Clara Gorney, Deceased,
James F. Bishop, Administrator of the Estate of Ellen Marie Gradert, Deceased,
James F. Bishop, Administrator of the Estate of Frank Grajek, Deceased,
James F. Bishop, Administrator of the Estate of Clara Grandt, Deceased,

James F. Bishop, Administrator of the Estate of Tillie Grandt, Deceased,
James F. Bishop, Administrator of the Estate of Emily H. Greabner, Deceased,
James F. Bishop, Administrator of the Estate of Leonardo Greco, Deceased,
James F. Bishop, Administrator of the Estate of Edward Grimms, Deceased,
James F. Bishop, Administrator of the Estate of Katarzyna Grochowski, Deceased,
James F. Bishop, Administrator of the Estate of Emma Grossman, Deceased,
James F. Bishop, Administrator of the Estate of Helen Grzeskowiak, Deceased,
James F. Bishop, Administrator of the Estate of William Guenther, Deceased,
James F. Bishop, Administrator of the Estate of Frank Hajduk, Deceased,
James F. Bishop, Administrator of the Estate of Theodore Hallas, Deceased,
James F. Bishop, Administrator of the Estate of Katherine Margaret Hamilton, Deceased,
James F. Bishop, Administrator of the Estate of Inga L. Hammersted, Deceased,
James F. Bishop, Administrator of the Estate of Harold Hans Hansen, Deceased,
James F. Bishop, Administrator of the Estate of Elizabeth Harke, Deceased,
James F. Bishop, Administrator of the Estate of John F. Hawkins, Deceased,
James F. Bishop, Administrator of the Estate of Mary Hefferen, Deceased,
James F. Bishop, Administrator of the Estate of John Helfenbien, Deceased,
James F. Bishop, Administrator of the Estate of Barbara Elizabeth Hengels, Deceased,
James F. Bishop, Administrator of the Estate of Henry Hill, Deceased,
James F. Bishop, Administrator of the Estate of Mary Hill, Deceased,
James F. Bishop, Administrator of the Estate of Anna Hillmann, Deceased,

James F. Bishop, Administrator of the Estate of William Hinczewska, Deceased.
James F. Bishop, Administrator of the Estate of Clifford Edward Hipple, Deceased,
James F. Bishop, Administrator of the Estate of Cora May Hipple, Deceased,
James F. Bishop, Administrator of the Estate of Hazel Marie Hipple, Deceased,
James F. Bishop, Administrator of the Estate of George Holke, Deceased,
James F. Bishop, Administrator of the Estate of William Holtz, Deceased,
James F. Bishop, Administrator of the Estate of Vincent Holub, Deceased,
James F. Bishop, Administrator of the Estate of Sophie Homola, Deceased,
James F. Bishop, Administrator of the Estate of Vlasta Homola, Deceased,
James F. Bishop, Administrator of the Estate of Ella Horazdovsky, Deceased,
James F. Bishop, Administrator of the Estate of Emma Horazdovsky, Deceased,
James F. Bishop, Administrator of the Estate of Ruth E. Hubbard, Deceased,
James F. Bishop, Administrator of the Estate of Joseph Hutchinson, Deceased,
James F. Bishop, Administrator of the Estate of Agnes Ignasiak, Deceased,
James F. Bishop, Administrator of the Estate of Antoinette Ignasiak, Deceased,
James F. Bishop, Administrator of the Estate of William Illig, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Albert Immel, Deceased,
James F. Bishop, Administrator of the Estate of Antoinette Inciardi, Deceased,
James F. Bishop, Administrator of the Estate of Stanley Jagoda, Deceased,
James F. Bishop, Administrator of the Estate of Ignatz Jakubowska, Deceased,
James F. Bishop, Administrator of the Estate of Antonette Jarzembowska, Deceased,

James F. Bishop, Administrator of the Estate of Julia Jaworski, Deceased,
James F. Bishop, Administrator of the Estate of Martha Jaworski, Deceased,
James F. Bishop, Administrator of the Estate of Lottie Jelen, Deceased,
James F. Bishop, Administrator of the Estate of Harry B. Johnson, Deceased,
James F. Bishop, Administrator of the Estate of George W. Jost, Deceased,
James F. Bishop, Administrator of the Estate of Blanche Kalal, Deceased,
James F. Bishop, Administrator of the Estate of Agnes Kasperski, Deceased,
James F. Bishop, Administrator of the Estate of Mary Kaszuba, Deceased,
James F. Bishop, Administrator of the Estate of Margaret Keenan, Deceased,
James F. Bishop, Administrator of the Estate of Mary Keenan, Deceased,
James F. Bishop, Administrator of the Estate of Albert J. Kennedy, Deceased,
James F. Bishop, Administrator of the Estate of Sebastian J. Kleifges, Deceased,
James F. Bishop, Administrator of the Estate of Aloysius Kluzynska, Deceased,
James F. Bishop, Administrator of the Estate of Lucy Kluzynska, Deceased,
James F. Bishop, Administrator of the Estate of Helen Klemkowski, Deceased,
James F. Bishop, Administrator of the Estate of Anna Knopik, Deceased,
James F. Bishop, Administrator of the Estate of Anna Kolar, Deceased,
James F. Bishop, Administrator of the Estate of Rose Kolder, Deceased,
James F. Bishop, Administrator of the Estate of Margaret Kommer, Deceased,
James F. Bishop, Administrator of the Estate of Steve Kouba, Deceased,
James F. Bishop, Administrator of the Estate of Anna Koukl, Deceased,

James F. Bishop, Administrator of the Estate of Annie Kowalski, Deceased,
James F. Bishop, Administrator of the Estate of Julia Kowalski, Deceased,
James F. Bishop, Administrator of the Estate of Walter Krajnik, Deceased,
James F. Bishop, Administrator of the Estate of George M. Krich, Deceased,
James F. Bishop, Administrator of the Estate of Helen Krzewinski, Deceased,
James F. Bishop, Administrator of the Estate of Walter Krzewinski, Deceased,
James F. Bishop, Administrator of the Estate of Walter Kubicki, Deceased,
James F. Bishop, Administrator of the Estate of Mary A. Kupski, Deceased,
James F. Bishop, Administrator of the Estate of Antoni Kwak, Deceased,
James F. Bishop, Administrator of the Estate of Joseph La Coiza, Deceased,
James F. Bishop, Administrator of the Estate of Casper Laline, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Walter Lange, Deceased,
James F. Bishop, Administrator of the Estate of Nellie Latowski, Deceased,
James F. Bishop, Administrator of the Estate of Walter Latowski, Deceased,
James F. Bishop, Administrator of the Estate of Hattie Laurinaitis, Deceased,
James F. Bishop, Administrator of the Estate of Ignatious Leonarczyk, Deceased,
James F. Bishop, Administrator of the Estate of Edward Leu, Deceased,
James F. Bishop, Administrator of the Estate of Violet Lewandowski, Deceased,
James F. Bishop, Administrator of the Estate of John Lewicki, Deceased,
James F. Bishop, Administrator of the Estate of Tillie Lewicki, Deceased,
James F. Bishop, Administrator of the Estate of John W. Lockey, Deceased,

James F. Bishop, Administrator of the Estate of Esther Lofgren, Deceased,
James F. Bishop, Administrator of the Estate of Frances Lohr, Deceased,
James F. Bishop, Administrator of the Estate of Barbara Lukens, Deceased,
James F. Bishop, Administrator of the Estate of John E. Lynch, Deceased,
James F. Bishop, Administrator of the Estate of John Lyons, Deceased,
James F. Bishop, Administrator of the Estate of Thomas Lyons, Deceased,
James F. Bishop, Administrator of the Estate of Julia Malecha, Deceased,
James F. Bishop, Administrator of the Estate of Mary Malik, Deceased,
James F. Bishop, Administrator of the Estate of Stephania Malik, Deceased,
James F. Bishop, Administrator of the Estate of John Manikowska, Deceased,
James F. Bishop, Administrator of the Estate of Louis Maranz, Deceased,
James F. Bishop, Administrator of the Estate of Josephine Markowski, Deceased,
James F. Bishop, Administrator of the Estate of Thomas Marren, Deceased,
James F. Bishop, Administrator of the Estate of Paul Marton, Deceased,
James F. Bishop, Administrator of the Estate of Paul Marton, Jr., Deceased,
James F. Bishop, Administrator of the Estate of May McKenna, Deceased,
James F. Bishop, Administrator of the Estate of John Joseph McMahon, Deceased,
James F. Bishop, Administrator of the Estate of Edna Meicke, Deceased,
James F. Bishop, Administrator of the Estate of Emma Meyer, Deceased,
James F. Bishop, Administrator of the Estate of Stella Michalski, Deceased,
James F. Bishop, Administrator of the Estate of Anna Mietlicki, Deceased,

James F. Bishop, Administrator of the Estate of Hedwig Milcarski, Deceased,
James F. Bishop, Administrator of the Estate of Joseph Mootz, Deceased,
James F. Bishop, Administrator of the Estate of Catherine Moran, Deceased,
James F. Bishop, Administrator of the Estate of Nellie Moran, Deceased,
James F. Bishop, Administrator of the Estate of Edward Moreau, Deceased,
James F. Bishop, Administrator of the Estate of Edwin Morizmeier, Deceased,
James F. Bishop, Administrator of the Estate of Catherine Moynihan, Deceased,
James F. Bishop, Administrator of the Estate of Hanora Moynihan, Deceased,
James F. Bishop, Administrator of the Estate of John Murawski, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Anna Myszkowski, Deceased,
James F. Bishop, Administrator of the Estate of Mildred Nepras, Deceased,
James F. Bishop, Administrator of the Estate of Lillie Neumann, Deceased,
James F. Bishop, Administrator of the Estate of Agnes Novotny, Deceased,
James F. Bishop, Administrator of the Estate of Mary Novotny, Deceased,
James F. Bishop, Administrator of the Estate of William Novotny, Deceased,
James F. Bishop, Administrator of the Estate of Eva Nowaczyk, Deceased,
James F. Bishop, Administrator of the Estate of Florian Nowak, Deceased,
James F. Bishop, Administrator of the Estate of Frances Nowak, Deceased,
James F. Bishop, Administrator of the Estate of Angeline Nyka, Deceased,
James F. Bishop, Administrator of the Estate of Catherine O'Donnell, Deceased,
James F. Bishop, Administrator of the Estate of Margaret Olson, Deceased,

James F. Bishop, Administrator of the Estate of Margaret O'Neill, Deceased,
James F. Bishop, Administrator of the Estate of Patrick O'Reilly, Deceased,
James F. Bishop, Administrator of the Estate of Ethel Osen, Deceased,
James F. Bishop, Administrator of the Estate of Pearl Osen, Deceased,
James F. Bishop, Administrator of the Estate of Martha Ostrowske, Deceased,
James F. Bishop, Administrator of the Estate of Frank Palacz, Deceased,
James F. Bishop, Administrator of the Estate of Peter Pankowski, Deceased,
James F. Bishop, Administrator of the Estate of Annie Parminter, Deceased,
James F. Bishop, Administrator of the Estate of Thomas W. Parminter, Deceased,
James F. Bishop, Administrator of the Estate of Carolina Parucka, Deceased,
James F. Bishop, Administrator of the Estate of Anna Patrunky, Deceased,
James F. Bishop, Administrator of the Estate of Martha Patrunky, Deceased,
James F. Bishop, Administrator of the Estate of James H. Payne, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Albert Pecha, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Tom Perich, Deceased,
James F. Bishop, Administrator of the Estate of Anna Pesch, Deceased,
James F. Bishop, Administrator of the Estate of Charles F. Pierce, Deceased,
James F. Bishop, Administrator of the Estate of Albert Pierson, Deceased,
James F. Bishop, Administrator of the Estate of Lottie Lucy Placzek, Deceased,
James F. Bishop, Administrator of the Estate of Susie C. Plamondon, Deceased,
James F. Bishop, Administrator of the Estate of Mae Poch, Deceased,

James F. Bishop, Administrator of the Estate of Mamie Ponicki, Deceased,
James F. Bishop, Administrator of the Estate of Eleanora Poppas, Deceased,
James F. Bishop, Administrator of the Estate of Martin Powlowski, Deceased,
James F. Bishop, Administrator of the Estate of Lillian Prochnow, Deceased,
James F. Bishop, Administrator of the Estate of Mike Psynko, Deceased,
James F. Bishop, Administrator of the Estate of Anna Quaine, Deceased,
James F. Bishop, Administrator of the Estate of Louisa Radoll, Deceased,
James F. Bishop, Administrator of the Estate of Frank W. Rakowski, Deceased,
James F. Bishop, Administrator of the Estate of Sophia Reis, Deceased,
James F. Bishop, Administrator of the Estate of Anna Reitinger, Deceased,
James F. Bishop, Administrator of the Estate of Ella Remy, Deceased,
James F. Bishop, Administrator of the Estate of Florence Remy, Deceased,
James F. Bishop, Administrator of the Estate of Mary Riedl, Deceased,
James F. Bishop, Administrator of the Estate of Rosie Riedl, Deceased,
James F. Bishop, Administrator of the Estate of Robert J. T. Riker, Deceased,
James F. Bishop, Administrator of the Estate of Herman A. Ristow, Deceased,
James F. Bishop, Administrator of the Estate of William F. Ristow, Deceased,
James F. Bishop, Administrator of the Estate of May Roglin, Deceased,
James F. Bishop, Administrator of the Estate of Clara Rohn, Deceased,
James F. Bishop, Administrator of the Estate of Lydia Rohn, Deceased,
James F. Bishop, Administrator of the Estate of Ella Rohse, Deceased,

James F. Bishop, Administrator of the Estate of Lillian Rohse, Deceased,
James F. Bishop, Administrator of the Estate of Minnie Roser, Deceased,
James F. Bishop, Administrator of the Estate of Monicka T. Rozycki, Deceased,
James F. Bishop, Administrator of the Estate of Blanche Rudcki, Deceased,
James F. Bishop, Administrator of the Estate of William J. Rupp, Deceased,
James F. Bishop, Administrator of the Estate of Elsie Rusch, Deceased,
James F. Bishop, Administrator of the Estate of Minnie Rylands, Deceased,
James F. Bishop, Administrator of the Estate of Rozalia Rynaszewski, Deceased,
James F. Bishop, Administrator of the Estate of Frank Sagenbrecht, Deceased,
James F. Bishop, Administrator of the Estate of John R. Sallwasser, Deceased,
James F. Bishop, Administrator of the Estate of Edwin W. Schaefer, Deceased,
James F. Bishop, Administrator of the Estate of Edward Schmelz, Deceased,
James F. Bishop, Administrator of the Estate of Sophia M. Schmidt, Deceased,
James F. Bishop, Administrator of the Estate of Carolina Schnell, Deceased,
James F. Bishop, Administrator of the Estate of Nellie Schnorr, Deceased,
James F. Bishop, Administrator of the Estate of Alma Schoenke, Deceased,
James F. Bishop, Administrator of the Estate of Edward Schultz, Deceased,
James F. Bishop, Administrator of the Estate of Sabina Schultz, Deceased,
James F. Bishop, Administrator of the Estate of Verna Schultz, Deceased,
James F. Bishop, Administrator of the Estate of Bertha Selig, Deceased,
James F. Bishop, Administrator of the Estate of Edward Selig, Deceased,

James F. Bishop, Administrator of the Estate of Frank Selig, Deceased,
James F. Bishop, Administrator of the Estate of Nellie Sherlock, Deceased,
James F. Bishop, Administrator of the Estate of Frances Siedlecka, Deceased,
James F. Bishop, Administrator of the Estate of Wilhelm M. Siegmann, Deceased,
James F. Bishop, Administrator of the Estate of Lena Siep, Deceased,
James F. Bishop, Administrator of the Estate of Joseph Sierazek, Deceased,
James F. Bishop, Administrator of the Estate of Mary Sierazek, Deceased,
James F. Bishop, Administrator of the Estate of Solomea Slominski, Deceased,
James F. Bishop, Administrator of the Estate of Roman Slowinski, Deceased,
James F. Bishop, Administrator of the Estate of Margaret Smith, Deceased,
James F. Bishop, Administrator of the Estate of Hattie Sosnowska, Deceased,
James F. Bishop, Administrator of the Estate of Charles Stahlik, Deceased,
James F. Bishop, Administrator of the Estate of Anna Staker, Deceased,
James F. Bishop, Administrator of the Estate of Pauline Staker, Deceased,
James F. Bishop, Administrator of the Estate of Hattie Steffen, Deceased,
James F. Bishop, Administrator of the Estate of Grace W. Stevens, Deceased,
James F. Bishop, Administrator of the Estate of Gertrude Stork, Deceased,
James F. Bishop, Administrator of the Estate of Katie Stranc, Deceased,
James F. Bishop, Administrator of the Estate of Jennie Streit, Deceased,
James F. Bishop, Administrator of the Estate of Mary Elizabeth Sullivan, Deceased,
James F. Bishop, Administrator of the Estate of Benedicta Switala, Deceased,

James F. Bishop, Administrator of the Estate of Josephine Szymanski, Deceased,
James F. Bishop, Administrator of the Estate of Herbert Taube, Deceased,
James F. Bishop, Administrator of the Estate of Clara Teichmiller, Deceased,
James F. Bishop, Administrator of the Estate of Anna Tempinski, Deceased.
James F. Bishop, Administrator of the Estate of George Theede, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Agnes Theis, Deceased,
James F. Bishop, Administrator of the Estate of Clara Theis, Deceased,
James F. Bishop, Administrator of the Estate of Emma Thommen, Deceased,
James F. Bishop, Administrator of the Estate of Arthur Tiedemann, Deceased,
James F. Bishop, Administrator of the Estate of Emily Tiedemann, Deceased,
James F. Bishop, Administrator of the Estate of Elizabeth Tismer, Deceased,
James F. Bishop, Administrator of the Estate of Ernest Tismer, Deceased,
James F. Bishop, Administrator of the Estate of Herbert Tismer, Deceased,
James F. Bishop, Administrator of the Estate of Minnie Tismer, Deceased,
James F. Bishop, Administrator of the Estate of George L. Tonnesen, Deceased,
James F. Bishop, Administrator of the Estate of Frank Tranckitella, Deceased,
James F. Bishop, Administrator of the Estate of John Uebel, Deceased.
James F. Bishop, Administrator of the Estate of Anna Urban, Deceased,
James F. Bishop, Administrator of the Estate of Zigmund Urbanowicz, Deceased,
James F. Bishop, Administrator of the Estate of Estelle Decker Valentine, Deceased,
James F. Bishop, Administrator of the Estate of Sylvia Eva Varela, Deceased,

James F. Bishop, Administrator of the Estate of Mary Vlasak, Deceased,
James F. Bishop, Administrator of the Estate of Christian Vogel, Deceased,
James F. Bishop, Administrator of the Estate of Albert Weichbrodt, Deceased,
James F. Bishop, Administrator of the Estate of Lydia Wellestat, Deceased,
James F. Bishop, Administrator of the Estate of Carrie Wesemann, Deceased,
James F. Bishop, Administrator of the Estate of Thomas Wielgos, Deceased,
James F. Bishop, Administrator of the Estate of John E. Wilkinson, Deceased,
James F. Bishop, Administrator of the Estate of Leonard Winski, Deceased,
James F. Bishop, Administrator of the Estate of Eva Wodtke, Deceased,
James F. Bishop, Administrator of the Estate of Harry C. Woller, Deceased,
James F. Bishop, Administrator of the Estate of Catherine E. Wood, Deceased,
James F. Bishop, Administrator of the Estate of George John Wood, Jr., Deceased,
James F. Bishop, Administrator of the Estate of Antonia Zastera, Deceased,
James F. Bishop, Administrator of the Estate of Julia Zastera, Deceased,
James F. Bishop, Administrator of the Estate of Mary Zastera, Deceased,
James F. Bishop, Administrator of the Estate of Alma Zielske, Deceased,
James F. Bishop, Administrator of the Estate of Josephine Zimma, Deceased,
James F. Bishop, Administrator of the Estate of Clemens Zuchowski, Deceased,
Rosie Albertz, Administratrix of the Estate of Mary Albertz, Deceased,
Richard Clarke, Administrator of the Estate of Robert L. Clarke, Deceased,
Harry Evenhouse, Administrator of the Estate of Annie Evenhouse, Deceased,

Harry Evenhouse, Administrator of the Estate of Jennie Evenhouse, Deceased,
Anton Forst, Administrator of the Estate of Emma Marie Forst, Deceased,
Samuel Ginsberg, Administrator of the Estate of Philip L. Ginsberg, Deceased,
George L. Farmer, Administrator of the Estate of John Ralph Holcombe, Deceased,
Maud P. Boyes, Administratrix of the Estate of Paul Jahnke, Deceased,
Lillian S. Schmalz, Administratrix de bonis non of the Estate of Nels Peter Johnson, Deceased,
Raymond Appelt, Administrator of the Estate of Leo Lewickki, Deceased,
Mary Murphy, Administratrix of the Estate of David M. Murphy, Deceased,
John A. Fitzgerald, Administrator of the Estate of Mary Murphy, Deceased,
Wilhelm Schoenholz, Administrator of the Estate of Adolphina Schoenholz, Deceased,
Anton Schultz, Administrator of the Estate of John Schultz, Deceased,
Martha Mundt, Administratrix of the Estate of Catherine Trogg, Deceased,
Martha Mundt, Administratrix of the Estate of Charles Trogg, Deceased,
Robert J. Mandl, Administrator of the Estate of Emil T. Zak, Deceased,
Lillian M. Budner, Mae Gehrke, William M. Gourlay, Kate Lyons, Mary Lyons, by Kate Lyons, as next friend, Winifred Lyons, by Kate Lyons, as next friend, John Marley, Martha Neumann, Bessie O'Brien, Edmund K. Plamondon, Irene C. Plamondon, Marie C. Plamondon, Nora Purcell, Emil Rupp, and Joseph Schultz, by Harry W. Standidge, their proctor, and in response to the rule entered to show cause why the prayer of the petition for a writ of prohibition should not be granted herein, state that said petition is insufficient on its face for the granting of the relief prayed for therein, and further state as follows:

1. That there is pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, before Honorable Kenesaw M. Landis, one of the judges of said court, the cause in admiralty of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, *et al.*, Libelants, *vs.* St. Joseph-Chicago Steamship Company, *et al.*, Respondents, said additional libelants in said cause being said respondents above named herein, and said additional respondents therein being 11 in number, and including petitioner herein, who, as alleged in the first paragraph on page 1 of said petition, was and is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business at Michigan City, Indiana.

2. That on August 21, 1915, James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, filed his libel in admiralty, in said cause, against petitioner, and others, as alleged in the second paragraph on pages 1 and 2 of said petition.

3. That after the filing of said libel in said cause, a citation was served upon petitioner, and thereupon petitioner filed exceptions to said libel, as set forth in the third paragraph on page 2 of said petition.

4. That as to the allegations of the fourth paragraph on pages 2 and 3 of said petition, respondents deny that on July 24, 1916, said original libelant was permitted to join as co-libelants with him 373 other libelants, and respondents say that on said 24th day of July, 1916, the court entered an order granting leave to 372 additional parties to intervene

as libelants in said cause, and thereupon also ordered that all libelants have leave to file an amended libel instanter; respondents admit that, as alleged in said fourth paragraph of said petition, said additional libelants were represented in part by said James F. Bishop, as administrator, etc., and other administrators of the estates of deceased people who lost their lives as passengers of the steamer Eastland at the same time and in the same way that said original libelant lost his life, by reason of the capsizing of said steamer, and that said co-libelants as administrators represented different deceased men, women and children, and that in addition thereto there were included a number of persons as co-libelants who sustained personal injuries and loss of property by reason of the capsizing of said steamer, all of which administrators and persons suing for personal injuries, loss of property, etc., have separate and distinct causes of action for the loss and damage sustained by them; respondents deny that said amended libel alleges that all of said libelants "have separate and distinct causes of action" for the loss and damage sustained by them; respondents deny that "no process was prayed for or issued under said amended libel", and say that said amended libel prayed "that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against said above named respondents, and each of them," (including said petitioner), "and that said respondents and each of them be cited to appear and answer upon oath all and singular the matters herein propounded, and that this Honorable Court decree the payment of the damages aforesaid, with costs, and that said

libelants may have such other and further relief as in law and justice they are entitled to receive," and process under said amended libel was issued against all respondents who were not parties to, and who had not been served with a citation under, said original libel.

5. Respondents admit that said amended libel alleges that petitioner was a corporation organized under the laws of the State of Indiana, as alleged in the fifth paragraph on page 3 of said petition.

6. Respondents say that they are not advised as to the truth of, and neither admit nor deny, the allegation in the sixth paragraph on page 3 of said petition, that at the time of the amending of said libel petitioner was a foreign corporation and non-resident of the State of Illinois, and not doing business in said state, and respondents deny the further allegation in said sixth paragraph that petitioner was "therefore not subject to service upon it by process of the District Court of the United States for the Northern District of Illinois."

7. Respondents admit that, as alleged in the seventh paragraph on pages 3 and 4 of said petition, upon the filing of said amended libel petitioner was ordered to plead to same by September 2, 1916, and that on said 2nd day of September, 1916, petitioner filed its exceptions to said amended libel alleging that said 373 co-libelants were improperly joined with said original libelant, as will appear from a copy of said exceptions set forth on page 15 of said petition, and respondents say that as to said order that petitioner plead to said amended libel by September 2, 1916, petitioner, by its proctor, Mr. Charles

E. Kremer, who is also proctor for petitioner herein, had notice of the application for, and was present in court at the time of the entry of, said order, and made no objection thereto, and the court entered said order upon agreement for the entry thereof by, and with the consent of, both said proctor for said petitioner and Harry W. Standidge, proctor for the libelants named in said amended libel, and upon request of said proctor for said petitioner that petitioner be given until September 2, 1916, which was forty days after July 24, 1916, the date of the entry of said order, to plead to said amended libel, and respondents say that on the fortieth and last day allowed by said order for petitioner to plead to said amended libel, petitioner complied with said order by filing exceptions to said amended libel, and so plead thereto without raising any objection whatever that it had not been served with a citation under said amended libel, as above set forth.

8. Respondents admit the allegations set forth in the eighth paragraph on page 4 of said petition, that on September 18, 1916, said cause came on for hearing before respondent upon said amended libel and said exceptions of petitioner thereto, and that thereupon, respondent, upon a hearing, overruled said exceptions and entered an order that petitioner have 20 days in which to plead to said amended libel.

9. Respondents say that as to the allegations in the ninth paragraph on page 4 of said petition, petitioner has failed to show in its said petition that after the court, on September 18, 1916, overruled said exceptions theretofore filed by petitioner to said amended libel and ordered petitioner to plead

thereto within 20 days thereafter, within said period of 20 days, and on October 7, 1916, which, as respondents are informed and believe, was prior to the time of the filing of said petition herein, petitioner filed additional exceptions to said amended libel in said cause, stating that petitioner did not waive said exceptions theretofore filed by it and insisted upon its right to further object to the joining of said additional libelants, and stating also that it further excepted to said amended libel because it did not state facts and circumstances which made out a cause of action against said petitioner, and that in all of said particulars said libel was imperfect and insufficient, and that petitioner was not bound to answer same, a copy of which exceptions is attached hereto and made a part hereof, and said additional exceptions are still on file and unheard and undisposed of in said cause, and respondents say that if said allegations in said additional exceptions to said amended libel that said amended libel does not state facts and circumstances which make out a cause of action against petitioner, and that therefore petitioner is not bound to answer same, are well founded in point of law, petitioner may never be required to answer said amended libel, and therefore respondents deny said allegations in said ninth paragraph of said petition that, because of the matters set forth in said petition, petitioner is compelled to answer said amended libel, or suffer a default, etc.

10. And respondents deny that by reason of the matters and things set forth in said petition petitioner is entitled to a writ of prohibition as prayed for therein. And respondents further say that if,

by reason of the matters and things set forth in said petition petitioner is entitled to a writ of prohibition as prayed for therein, petitioner is not entitled to such writ by reason of said additional exceptions filed by it to said amended libel, which, as above stated, are still on file and unheard and undisposed of in said District Court, and which petitioner has failed to set forth in its said petition, and a copy of which is attached hereto and made a part hereof, as above set forth.

Wherefore respondents pray that the prayer of the petition herein be denied.

JAMES F. BISHOP,
Administrator of the Estates of various deceased persons, and each thereof, as above set forth, Respondents herein.

HARRY W. STANDIDGE,
Proctor for Respondents.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

James F. Bishop, being duly sworn, says that he is Administrator of the Estates of various deceased persons, and each thereof, as above set forth; that he has read the above and foregoing return, and knows the contents thereof, and that the same is true, as he verily believes.

JAMES F. BISHOP,

Subscribed and sworn to before me this 1st day of December, A. D. 1916.

BLANCHE I. GRIER,
(Seal) *Notary Public.*

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Harry W. Standidge, being duly sworn, says that he is proctor for the respondents herein; that he has read the above and foregoing return, and knows the contents thereof, and that the same is true.

HARRY W. STANDIDGE,

Subscribed and sworn to before me this 1st day of December, A. D. 1916.

BLANCHE I. GRIER,
(Seal) *Notary Public.*

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

James F. Bishop, Administrator of the Estate of Earl H. Dawson, Deceased, *et al.*,
vs.
St. Joseph-Chicago Steamship Company, a corporation, *et al.*
} No. 32236.

And now comes the Indiana Transportation Company, one of the respondents above named, and excepts to the amended libel of James F. Bishop, administrator of the estate of Earl H. Dawson, deceased, and others, as follows:

This respondent does not hereby waive its exceptions heretofore filed in relation to the misjoinder of 373 additional libels and its right, and insists that this court has not jurisdiction of the respondent of so much of the said amended libel as sets up the claims of the 373 additional libelants, joined with the original libel, and it therefore insists upon its right to further object to the joining of said 373 additional libelants, and further because said amended libel does not state facts and circumstances which make out a cause of action against this respondent, in all of which particulars the said amended libel is imperfect and insufficient, and that the said respondent is not bound to answer the same.

INDIANA TRANSPORTATION COMPANY,
By C. E. KREMER,
Its Proctor.

C. E. KREMER,
Proctor for the Indiana Transportation Company.

EX PARTE INDIANA TRANSPORTATION COMPANY, PETITIONER.

ON PETITION FOR WRIT OF PROHIBITION.

No. 25, Original. Argued May 21, 1917.—Decided June 11, 1917.

The foundation of jurisdiction is physical power.

Appearance in answer to a citation issued upon a libel *in personam* does not empower the court to introduce new claims of new claimants into the suit without service on the defendant and against his will.

After defendant had appeared in a suit against it for causing the death of one person, the court allowed to be filed an amended libel introducing 373 new libellants, each alleging a distinct cause of action based on as many other deaths due to the same accident. Defendant excepted to the amended libel upon the ground that it was contrary to law (1) because it joined 373 new libellants who had separate causes of action, and (2) because it could not "in law, in this case, be called upon to answer the said amended libel as to 373 additional libellants." *Held* that this was not a general appearance and that want of service upon the defendant was sufficiently set up by the second ground of exception.

Quære: Whether the principles of waiver and appearance are not modified in a case where the defendant is already in court and the objection to jurisdiction relates to the introduction of new complainants?

When objections to the jurisdiction have been overruled, the defendant does not waive them by pleading to the merits.

Prohibition granted.

THE case is stated in the opinion.

Mr. Charles E. Kremer and *Mr. Russell Mott* for petitioner.

Mr. Harry W. Standidge (by special leave) in support of return of respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

The suit in which this writ of prohibition is sought was originally a libel *in personam* against the petitioner, an Indiana corporation, and others, for causing the death of one Dawson through the capsizing of the steamer Eastland in the Chicago River. The libel was filed on August 21, 1915. A citation was served upon an agent of the petitioner within the district and the petitioner filed exceptions to the libel. On July 24, 1916, leave was granted "to certain parties" to intervene as libellants, and a citation to respondents not served was ordered, returnable the first Monday in September. At this time the petitioner was not subject to service in the district and was not served with process. The "certain parties" mentioned in the order seem to have been 373 other libellants each alleging a distinct cause of action for death due to the same accident. The petitioner excepted that the amended libel was contrary to law because it joined 373 other libellants who had separate causes of action, and also because the petitioner could not in law be called on to answer the amended libel as to 373 additional libellants. The exceptions were overruled and the petitioner directed to answer in twenty days from the date of the order, September 18, 1916. Thereupon the petitioner, not waiving its previous exceptions, on October 7 again excepted that the court had not jurisdiction over it in respect of the additional libellants and that the libel did not state a cause of action against it. On October 25 this petition was filed.

The foundation of jurisdiction is physical power. If a defendant's body were in custody by arrest, or a vessel were held by proceedings *in rem*, it well might be that new claims would be entertained against the person or against the ship, in addition to those upon which the arrest was made. *The Oregon*, 158 U. S. 186, 210. But appearance in answer to a citation does not bring a defendant under

the general physical power of the court. He is not supposed even by fiction to be in prison. Conventional effect is given to a decree after an appearance because when power once has been manifested it is to the advantage of all not to insist upon its being maintained to the end. *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353. That, however, is the limit of the court's authority. Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before. *The Oregon*, 158 U. S. 186, 205, 210. We may repeat with more force concerning defendants what was said *alio intuitu* in a New Jersey case cited in *Reynolds* v. *Stockton*, 140 U. S. 254, 268. "Persons by becoming suitors do not place themselves for all purposes under the control of the court."

The only question is whether the petitioner lost its rights by its mode of asserting them; the argument for the respondent being that the exceptions above mentioned amounted to an appearance and plea to the merits, and that thus the absence of service was cured. But it is to be remembered that the motion for leave to intervene was a motion in the cause in which petitioner already had appeared. We should not be astute to treat recognition that it was in court as the case stood before the motion to let in upon it an avalanche of new claims, as waiving what it was the prime and only purpose of the exceptions to prevent. The language of the first exceptions was not as explicit as it might have been but the absence of service seems to us sufficiently covered by the words, "Because the above-named respondent cannot in law, in this case, be called upon to answer the said amended libel as to 373 additional libellants."

The second exception, still insisting on the petitioner's

denial that the court had jurisdiction of it in respect of the new claims set up, pleaded further, upon the rule to answer, that the amended libel did not state a cause of action. But if the principles of waiver and appearance by pleading to the merits are not modified in a case where the defendant already is in court, it is true at least that when objections to the jurisdiction have been overruled the defendant does not lose its rights by pleading to the merits. *Harkness* v. *Hyde*, 98 U. S. 476. The District Court attempted to exceed its jurisdiction and the writ of prohibition should be granted.

Rule absolute.